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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-709

United States of America *ex rel* David P. Weinberger, and DAVID P. WEINBERGER, ESQ., individually,
Petitioners,

versus

EQUIFAX, INC. (formerly Retail Credit Company),
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(Printed November 16, 1977)

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IN THE
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No.

United States of America *ex rel* David P. Weinberger, and DAVID P. WEINBERGER, ESQ., individually,
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versus

EQUIFAX, INC. (formerly Retail Credit Company),
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays for the issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit, in the case styled *United States of America ex rel David P. Weinberger, and DAVID P. WEINBERGER, ESQ., individually, v. EQUIFAX, INC. (formerly Retail Credit Company)*, USCCA 5 Docket No. 75-3491, an appeal from dismissal on motion in the United States District Court for the Southern District of Florida, Miami Division, Civil Action # 75-526-Civ-WM.

OPINIONS BELOW

In a panel decision the Court of Appeals affirmed an apparently unpublished memorandum opinion of the

United States District Court for the Southern District of Florida, Miami Division, granting respondent's (defendant's) motion to dismiss. The trial court's dismissal order appears in Appendix A herewith, pp. 1-A through 5-A. The Court of Appeals affirmed by panel opinion, published at 557 F.2d 456, Appendix A at pp. 6-A through 19-A. The denial of plaintiff-relator-appellant Weinberger's timely petition for rehearing appears at pp. 20-A — 21-A herewith. The Court of Appeals also denied a suggestion of rehearing *en banc*.

JURISDICTION

Jurisdiction of this Court is sought to be invoked pursuant to Title 28, United States Code, Sections 1331(a), 1254(1), 2101(c), and in accordance with Rules 19, 21, 22 and 23 of this Court. The decision of the Court of Appeals was entered on August 12, 1977. A timely petition for rehearing was filed after the grant of an extension to submit same and denied by a Court of Appeals order entered on October 4, 1977 (pp. 20-A — 21-A).

QUESTIONS PRESENTED

I.

WHETHER DECISIONS OF THE COMPTROLLER GENERAL OF THE UNITED STATES HAVE THE FORCE OF ADMINISTRATIVE INTERPRETATIONS BY FEDERAL AGENCIES EMPOWERED BY CONGRESS TO CONSTRUE STATUTES, IN VIEW OF CONGRESSIONAL INTENT THAT HE EXAMINE GOVERNMENT FINANCIAL TRANSACTIONS TO DETERMINE IF THEY HAVE BEEN CONSUMMATED IN ACCORDANCE WITH LAWS, REGULATIONS OR OTHER LEGAL

REQUIREMENTS, 31 U.S.C. § 65(d), HIS STATUS AS AN AGENT OF CONGRESS, AND THE FACT THAT CONGRESS HAS PLACED HIS GENERAL ACCOUNTING OFFICE WITHIN THE LEGISLATIVE BRANCH OF THE FEDERAL ESTABLISHMENT.

II.

WHETHER COMPTROLLER GENERAL DECISIONS HOLDING THAT THE THRUST OF THE "ANTI-PINKERTON" ACT, 5 U.S.C. § 3108, IS DIRECTED AT VENDORS WHOSE CHARTERS AUTHORIZE THE CONDUCT OF *INVESTIGATIVE* (RATHER THAN PROTECTIVE OR SECURITY) SERVICES BY OTHER THAN AN OMNIBUS CLAUSE, TO PROHIBIT *ANY* CHARACTER OF SERVICE UNLESS NON-INVESTIGATIVE FUNCTIONS ARE FURNISHED THROUGH A *PRIMA FACIE* SEPARATE BUSINESS ENTITY, IS THE CORRECT CONTEMPORARY CONSTRUCTION OF THAT ACT IN LIGHT OF TEN UNSUCCESSFUL ATTEMPTS AT REPEAL OR MODIFICATION SINCE 1960.

III.

WHETHER A FALSE CLAIM WITHIN THE MEANING OF 31 U.S.C. §§ 231 *et seq.* CAN RESULT FROM GOVERNMENT PAYMENTS TO A VENDOR WHOSE CONTRACT IS NOT AUTHORIZED BY OFFICIAL INTERPRETATIONS OF A *SUBSTANTIVE STATUTE* (As DISTINCT FROM MERE PROCEDURE OR REGULATION), EVEN THOUGH THE VENDOR MADE NO CERTIFICATIONS OF COMPLIANCE WITH SUCH NON-PENAL STATUTE BECAUSE THE GOVERNMENT HAD NOT REQUIRED IT TO DO SO.

IV.

WHETHER AN INFORMER POSSESSED OF JURISDICTION AND STANDING UNDER THE FALSE CLAIMS ACT, 31 U.S.C. §§ 231, *et seq.*, WITHOUT MORE, ALSO POSSESSES STANDING TO SEEK A JUDICIAL DETERMINATION OF INVALIDITY OF A VENDOR'S GOVERNMENT CONTRACT, ON THE THEORY THAT (1) THE ZONE OF INTEREST SOUGHT TO BE PROTECTED BY THE FALSE CLAIMS ACT INCLUDES MISREPRESENTATIONS TO OR CONCEALMENTS FROM THE GOVERNMENT RESULTING IN A CONTRACT WHICH IS NOT IN ACCORDANCE WITH OFFICIAL INTERPRETATIONS OF A SUBSTANTIVE FEDERAL STATUTE, and (2) THAT THE INFORMER'S INFORMATION ON WHICH JURISDICTION IS BASED CREATES IN HIM A LEGAL INTEREST MATERIALLY DIFFERENT AND GREATER THAN MEMBERS OF THE GENERAL POPULATION.

FEDERAL STATUTES INVOLVED

(Appendix B, pp. 21-A through 27-A)

Title 5, United States Code, Section 3108 (the "anti-Pinkerton" act); Title 31, United States Code, Sections 231, 232, 233 and 235 (the False Claims Act); Title 31, United States Code, Section 65(d) (a provision of the Accounting and Auditing Act of 1950).

STATEMENT OF THE CASE

The first issue presented by this case, *ante* at pp. 2-3, is of enormous legal impact in federal procurement

matters. The second question has potential effect on every natural person subject to jurisdiction of the United States. Prior to this suit, the 84-year-old "anti-Pinkerton" enactment (now 5 U.S.C. § 3108) had never been construed by a federal court, although the Comptroller of the Treasury, the Army's Judge Advocate General, the Attorney General and most recently, frequently and consistently the Comptroller General have interpreted it. Since 1950 there have been ten attempts in Congress to repeal or modify 5 U.S.C. § 3108 or its predecessor, 5 U.S.C. § 53 before recodification into positive law in 1966.

The principal contention of this action brought under the False Claims Act, 31 U.S.C. §§ 231 *et seq.* and the "anti-Pinkerton" statute is that *this particular* "consumer reporting agency," 15 U.S.C. § 1681a(f), but *NOT every* such organization *per se*, is a prohibited detective agency for federal procurement purposes and that false claims within the meaning of 31 U.S.C. § 231 resulted when respondent was paid on its billings under Government contracts resulting from respondent's material misrepresentations or concealments as to its status. Petitioner contends respondent knew, or had legally sufficient reason to know, that its services were unauthorized by official interpretations of a substantive federal statute, 5 U.S.C. § 3108, and a federal regulation as well [Armed Services Procurement Regulations, ASPR § 22.108, 32 C.F.R. 22.108; 36 F.R. 21169, Nov. 4, 1971].

The basis for petitioner's argument that this particular agency is a prohibited one includes (but is not limited to) respondent's: (*I*) *confidential* admissions

not revealed to the Government that it regarded the Pinkerton National Detective Agency as a competitor in markets of significant size for *PERSONAL investigative* services; (*II*) failure to disclose to Government procurement personnel its use of detective agency methods such as 'pretext' (i.e., subterfuge) to elicit, develop, detect or discover information on natural persons, and surveillance of individuals when insurance claim fraud is suspected; (*III*) repeated denials to Congress that it is a detective agency (complaint, ¶ 9, Rec. and App. p. 7) while failing to disclose that it actually held licenses under the same state laws applicable to Pinkerton's and other leading agencies; (*IV*) charter authorization (by other than an 'omnibus' clause) to probe personal claims, advise insurors of the *propriety or advisability* of accepting applications for coverage (Rec. p. 161, App. p. 70) and to conduct a general (personal) 'reporting' (i.e., investigative) business; (*V*) admitted objective of developing *all* available information on individuals for its clients *irrespective of whether it is public record;* (*VI*) indictment, plea and fine with Pinkerton's and other major detective agencies for 'giving a municipal employee an unlawful gratuity' as a means of eliciting non-public information about individuals from public employees (complaint, ¶11, Rec. and App. p. 10); (*VII*) investigation of a U.S. Senate aide for a client whose interests were affected by legislation the aide was drafting (Page 28-A, *post;* complaint, ¶ 9, Rec. and App. p. 7); (*VIII*) participation with others in the detection of crime, and (*IX*) failure to furnish non-investigative services to the Government through a wholly-owned but *prima facie* separate subsidiary enterprise which does not 'report' on personal immorality, impropriety, crime or unethical conduct and

having unconsolidated books of account, independent management and operating personnel apart from the parent organization, etc. in order to comply with the requirements set forth in a 1962 decision from the General Accounting Office [41 CompGen 819; see Rec. at pp. 108 *et seq.*). See also 44 CompGen 564 (1965), Rec. pp. 110-114, App. pp. 43-48.

This lawsuit was triggered by the only inconsistent Comptroller General decision interpreting the prohibition on Government hire of detectives, which declined to apply the prohibition to respondent. See 54 MS CompGen #B-139965, Jan. 10, 1975, Rec. pp. 159-164, App. pp. 68-73 (unpublished). As with all other decisions of the Comptroller General interpreting the "anti-Pinkerton" act, that law's applicability to respondent was not found to depend upon whether it furnished armed guard (i.e., 'security' or 'protective' services) or 'quasi-military, mercenary forces as strikebreakers.' This opinion declined to apply the prohibition of 5 U.S.C. § 3108 to respondent because it was engaged in some type of investigative work which would not make it a prohibited agency for purposes of the statutory prohibition, or perhaps because of some exemption thought to exist for "consumer reporting agencies," 15 U.S.C. § 1681a(f) or for the reason that its authorization to conduct investigative services was thought to come from an omnibus rather than a specific provision of its charter. At the time this inconsistent decision was written (54 MS CompGen #B-139965, Jan. 10, 1975), the General Accounting Office did not reveal it was a client of respondent. Petitioner developed that information during the pendency of the appeal and brought it to the attention of the Court of Appeals. See Appellant's Reply to

Appellee's Supplemental Brief at page 2, filed with the Court of Appeals on Feb. 24, 1977.

Though it found standing entirely lacking, the trial court proceeded to interpret the "anti-Pinkerton" act, 5 U.S.C. § 3108, as applicable only to organizations furnishing "detective agents" (not otherwise described) *during times of labor unrest*. Rec. p. 171, App. p. 79. The district judge found the false claim count dependent upon applicability of 5 U.S.C. § 3108 to respondent. He therefore had no need to proceed into a legal analysis of whether a false claim within the meaning of 31 U.S.C. § 231 *et seq.* existed. On a motion to dismiss and without a hearing, the trial judge found respondent to be a credit reporting rather than detective agency despite the contrary and profuse allegations of the complaint. This point was raised on appeal but not addressed by the Court of Appeals.

At oral argument the Court of Appeals was concerned almost exclusively with questions of standing. It permitted an exchange of briefs thereafter, in addition to one just prior to hearing because more than a year had elasped during which the appeal had been pending. The Court of Appeals denied further oral argument and declined to certify the question of "anti-Pinkerton" act construction to this Court. By panel opinion, the Court of Appeals held that: (*I*) petitioner had standing to maintain a False Claims Act suit [557 F.2d at 460], (*II*) petitioner met the jurisdictional requirement of 31 U.S.C. § 232(C) since his informer's suit rested on information not in the Government's possession prior to filing the action [557 F.2d at 460]; (*III*) petitioner did not possess standing to seek a declaratory judgment as to the invalidity of

respondent's contracts [557 F.2d at 459-460]; (*IV*) petitioner did not allege facts which would bring respondent Equifax under the proscription of the "anti-Pinkerton" act, 5 U.S.C. § 3108 [557 F.2d at 461] because no allegation had been made respondent furnished armed guards or a mercenary, quasi-military armed force (as strikebreakers) [557 F.2d at 461, 462]; (*V*) the lower court erred in finding the prohibition of 5 U.S.C. § 3108 as effective only in times of labor unrest [557 F.2d at 462], and (*VI*) even if the "anti-Pinkerton" statute were applicable to respondent, no false claim would have existed because the Government had not required respondent to represent it was not a detective agency [557 F.2d at 461].

In declining to follow Comptroller General interpretations of 5 U.S.C. § 3108, the district court and the Court of Appeals both relied on one case which arguably does not correctly describe the unique status of that officer in the federal establishment. The decision of the Court of Appeals renders 5 U.S.C. § 3108 a nullity and is not a reasonable conclusion in light of frequent interpretations of and attempts to repeal or modify that law since 1960. This petition for certiorari ensued because of the importance of at least the first two of the four issues presented by this controversy, *ante*, pp. 2-4. Petitioner has requested the Clerk of the Court of Appeals to certify and forward to this Court the record, all briefs and the appendix filed there, for possible use in evaluating this petition and controversy.

REASONS WITHIN RULE 19 OF THIS COURT WHY THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED

(A) The Court Of Appeals Has Decided Important Questions Of Federal Statutory Law Which Have Not Been, But Should Be, Decided By This Court

1.

The weight to which decisions of the Comptroller General are entitled in judicial proceedings: Since 1960, when onslaughts in Congress on the "anti-Pinkerton" statute began, the Comptroller General has issued as many, or more, decisions interpreting that law as had been issued by that officer theretofore. The office of Comptroller General and his General Accounting Office were established by the Budget and Accounting Act of 1921. Since the end of World War II, important changes have been made to the status of the Comptroller General in the federal government. The General Accounting Office he heads became part of the legislative branch of government under the Reorganization Acts of 1945 and 1949. The Comptroller General was appointed an agent of Congress by the Accounting and Auditing Act of 1950. In that capacity Congress intends that he examine Government fiscal transactions *for compliance with laws, regulations or other legal requirements*, 31 U.S.C. § 65(d), Appendix B herewith at page 21-A.

Both the trial court (at Rec. p. 220, App. p. 111 in a post-dismissal order) and the Court of Appeals (557 F.2d at p. 463, n. 6) cite *United States ex rel Brookfield Construction Co. v. Stewart*, 235 F.Supp. 94 (D.D.C. 1964), *aff'd. per curiam* 119 U.S.App.D.C. 259, 339 F.2d 753 (C.A.D.C. 1964) for an explanation of the role of the Comptroller General in the federal establishment.

Judge Holtzoff's opinion in *Stewart, supra*, was written after Congress made the Comptroller General its agent and placed his office within the legislative branch of Government. It makes no mention, however, of these events and is arguably in error when it describes the Comptroller General's function as the dual role of officer of both legislative and executive branches of the Government, 234 F.Supp. at 99. The *Stewart* opinion does not reveal how an executive department function can be carried out by an official located in the legislative branch who has been appointed an agent of Congress. The *Stewart* finding that the Comptroller General is not a law officer and does not render legal opinions, 234 F.Supp. at 100, is clearly contrary to a declaration of Congressional intent, 31 U.S.C. § 65(d). SUBMITTED: The question of whether Comptroller General decisions are entitled to at least equal weight in judicial proceedings as interpretations of statutes by agencies authorized by Congress to make such constructions is an important one which has not been, but should be, resolved by this Court in view of the enormous volume of Government spending subject to review by the General Accounting Office and Congressional intent.

2.

Construction of the "anti-Pinkerton" act, 5 U.S.C. § 3108: The reasons why this enactment should be judicially construed as a broad disapproval by Congress of *any* Government involvement with detective (i.e., *investigative*) agencies include (but are not necessarily limited to) the *(I)* findings of Congressional committees that Pinkerton's was founded principally as a 'general detective business' which

thereafter added the offering of armed guard services [H.Rept. 2447, Judiciary Committee, 52d Cong., 2d Sess., Feb. 7, 1893 at pp. xiv, xvii; S.Rept. 1280, Judiciary Committee, 52d Cong., 2d Sess.; petitioner's principal brief on appeal at pp. 22-23]; *(II)* conclusion of Congress that it was without the power to regulate the ill complained of (abusive hire of armed guards by property owners), and since no interstate transportation of armed bodies of men had been shown that it was for the States to regulate such practices (petitioner's principal brief on appeal, pp. 23-26); *(III)* fact that neither the Federal Government nor the Government of the District of Columbia, upon whom the statutory prohibition is placed, had abusively hired armed guards or strikebreakers; *(IV)* rejection by Congress of the language "*Pinkerton detectives or other association of men as armed guards*" in legislative debate on a proposed amendment in 1892 (petitioner's principal brief on appeal at p. 22) whose sponsor hardly spoke for the majority of the 52d Congress when he stated at 23 Cong.Rec. H 7120 (August 5, 1892) that "nobody objects to the legitimate use of Pinkerton detectives as such"; *(V)* fact that no officer of the United States has ever interpreted the application of the detective agency prohibition to depend upon whether the vendor or bidder furnished armed guards, strikebreakers or 'quasi-military, mercenary forces'; *(VI)* fact that when the "anti-Pinkerton" enactment became a permanent provision of law in 1893 (27 Stat. 591, March 3, 1893) after having been enacted provisionally the year before (27 Stat. 368, August 5, 1892), no unrest then existed over the use of strikebreakers or 'quasi-military, mercenary forces', and *(VII)* lack of a Congressional understanding, BASED ON STATEMENTS TO ITS COMMITTEES BY

RESPONDENT'S EXECUTIVES DURING ENACTMENT OF THE FAIR CREDIT REPORTING ACT (complaint, ¶ 9, Rec. and App. p. 7) that it was approving Government business [by 15 U.S.C. § 1681b(3)] with organizations which, though known as 'credit' or "consumer reporting agencies" [15 U.S.C. § 1681a(f)] engage in such highly personal and far-reaching probes into the private lives of individuals as to encompass drinking habits and homosexuality (Appendix C, pp. 29-A, 30-A) and thus be considered as detective agencies under some state laws.

Petitioner contends that Comptroller General constructions of the "anti-Pinkerton" statute (except the aberrant one of Jan. 10, 1975 which caused this suit, Rec. pp. 159-164, App. pp. 68-73), are entitled to great weight in judicial proceedings because Congress has conferred a unique and extraordinary status on him, because his interpretations are fully supported by the legislative history, and because that officer is fully empowered to construe a substantive federal statute whose words are plain on their face. In the paragraph at mid-page 4 of the deviant decision, # B-139965, Jan. 10, 1975 [Rec. p. 160, App. p. 69], the Comptroller General suggests that certain kinds of investigative work exist which would not make the organizations carrying them out prohibited detective agencies for purposes of the "anti-Pinkerton" act's prohibition. Obviously, however, respondent is engaged in the kind of investigative work which should make it a detective agency for purposes of that statutory proscription, based on the words of respondent's chief executive officer cited in the complaint at ¶8, Rec. and App. p. 6:

> "... we have on occasions sufficiently numerous to be very disturbing to us, been given information about an individual establishing his connection with the underworld. Needless to say, this information is of great importance to our customers in making legitimate business decisions ..."

Respondent's investigative activities are not part of a media or publishing enterprise to which the statutory prohibition is obviously not applicable, because it is engaged in the sale of personal information on a restricted basis and not to the general public.

Although the Fifth Circuit Court of Appeals has said that legislative history is not to be resorted to if there is nothing ambiguous or doubtful about the language of a statute, *Globe Seaways, Inc. v. Panama Canal Co.*, 509 F.2d 969, 971-2 (CA 5, 1975); *General Electric Co. v. Southern Construction Co.*, 383 F.2d 135, 138 (CA 5, 1967), and that legislative history may not be used to override unambiguous language of a statute, *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 217 (CA 5, 1974), it proceeded into an analysis of the legislative history behind the one sentence statute (5 U.S.C. § 3108) here in question. In its generic context, the name Pinkerton has been synonymous with sleuth rather than a quasi-military mercenary, and Congress did not fail to distinguish between armed guards and detectives (petitioner's principal brief on appeal, p. 22). Regardless of whether resort to the legislative history of a one-sentence statute whose words are plain and unambiguous was proper, the result should be the same: if a "consumer reporting agency" chooses to carry its activities far enough, as it is alleged respon-

dent has done, the substantive statutory prohibition should come into play. In a free society where the power to govern derives from the consent of the governed the construction of a proscription on Government hire of detectives for any purpose, irrespective of whether they offer 'mercenary, quasi-military' armed force for hire, is a question of very great import which has not thus far been, but should be, decided by this Court.

3.

Whether certification by a Government vendor of compliance with a substantive statute is necessary in order for a false claim to be made out under 31 U.S.C. § 231: The wording of this statute is by no means such as to require certifications to have been made before the Government can be said to have been victimized by a vendor's fraud or deceit. In view of the fact that 5 U.S.C. § 3108 is not a procedural statute for the convenience of the Government which it may waive, *Moran Bros., Inc. v. United States*, 346 F.2d 590, 593 (Ct. Cl., 1965), but is a substantive law, and in view of the doctrine of incorporation of procurement regulations into Government contracts, *G. L. Christian Associates v. United States*, 312 F.2d 418 (Ct. Cl., 1963), *cert. den.* 375 U.S. 954, 84 S.Ct. 444, 11 L.Ed.2d 314, this important question of law should be ruled on by this Court because it does not appear to have previously construed 31 U.S.C. § 231 as requiring certification of compliance with substantive statutory law before a false claim can be established.

4.

Whether an informer who possesses jurisdiction and standing under the False Claims Act, 31 U.S.C.

§§ 231 *et seq.*, must allege direct injury to himself in order to have standing to seek a judicial declaration of invalidity of a Government contract. This question of standing appears to be one of first impression. Congress clearly has the power to create statutory causes of action, providing it does not attempt to confer jurisdiction on Article III federal courts to render advisory opinions. *Linda R.S. v. Richard D. and Texas et al.*, 410 U.S. 614, 93 S.Ct. 1146, 1148 n. 3, 35 L.Ed.2d 536 (1973). Congress has validly exercised such power in enacting the false claims statute. In the process, *Congress confers standing on an informer who is different from the public at large, in that he comes forward with information not in the Government's hands at the time suit is brought.* As the Court of Appeals correctly found, 557 F.2d at 460, the informer need not allege direct injury to himself to maintain his statutory *qui tam* action under 31 U.S.C. § 232. But citation by the Court of Appeals at 557 F.2d 459 of *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343, 1975 and *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184, 1970, is inapposite. In neither of those cases was the party whose standing was questioned positioned as the instant petitioner, with standing on the basis of status and information not possessed by members of the general population under a statute whose zone of interest arguably includes the declaratory relief sought. In respect to the declaratory relief sought here (invalidity of respondent's Government contracts), if the statutory detective prohibition applied but technically a false claim had not been made, the petitioner's information nevertheless makes his interest quite different from other members

of the population at large. Petitioner contends his is not a "generalized grievance", 557 F.2d at 460, n. 3, which is "too tenuous and undifferentiated from the interests of others to afford him standing" for the declaratory relief sought. Id.

One of the cases cited by the Court of Appeals, *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152, 90 S.Ct. 827, 25 L.Ed.2d 184, 187, 1970, itself distinguishes between *types of actions for standing purposes* (i.e., taxpayer's or competitor's suits). And the other case cited by the Court of Appeals, *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343, 356, 1975 recognizes the very argument petitioner advances here for declaratory relief:

> "But so long as this requirement (of actual or threatened injury required by Article III for "case or controversy" and justiciability) is satisfied, PERSONS TO WHOM CONGRESS HAS GRANTED A RIGHT OF ACTION, EITHER EXPRESSLY OR BY CLEAR IMPLICATION, MAY HAVE STANDING TO SEEK RELIEF ON THE BASIS OF LEGAL RIGHTS AND INTERESTS OF OTHERS, AND, INDEED, *MAY INVOKE THE GENERAL PUBLIC INTEREST IN SUPPORT OF THEIR CLAIM* (citations omitted, emphasis added by petitioner).

Other oft-cited cases on standing, such as *Public Citizen, Inc. v. Simon*, 539 F.2d 21 (C.A.D.C. 1976) are also inapposite here. Petitioner is not asking the Government to take, or refrain from taking, any action

nor is he challenging executive action. He is simply asking for a judicial declaration of the applicability of a substantive federal law in a controversy to which he is a party on the basis of information which sets him apart from members of the population at large. With respect to the declaratory relief herein sought, the standing issue is not only unique but is vitally important to individuals and groups who would litigate to promote the general interest as well as their own particular stake. It is a question which has not been decided by this Court under the False Claims Act, but should be.

(B) The Court Of Appeals Has Rendered A Decision In Conflict With The Decision Of Another Court Of Appeals On The Same Matter.

On the question of whether respondent may have made false claims upon the United States within the meaning of 31 U.S.C. § 231 (assuming that 5 U.S.C. § 3108 applied to respondent), the Court of Appeals said at 557 F.2d 461 that

> "(u)nless the government made it clear that it would not employ detective agencies when it contracted for the work, Equifax's *application* did not make a material misrepresentation, did not mislead the government, and did not defraud the government within the meaning of the False Claims Act." (e.s.)

The complaint as amended once as of right (Rec. p. 81. App. p. 22) contended that the *payments* on respondent's Government contracts constituted the

false claims alleged, not the *applications* for such payments (by bills and invoices).

In *United States v. Cooperative Grain & Supply Co.*, 476 F.2d 47 (CA 8, 1973), a thorough analysis of the False Claims Act appears, including its legislative history. The Eighth Circuit Court of Appeals opined that a specific intent (*mens rea*), while perhaps necessary under any criminal statute equivalent to 31 U.S.C. § 231, is not necessary under the False Claims Act, 31 U.S.C. §§ 231 *et seq*. Liability was fastened upon farmers who, in grossly negligent fashion, signed applications for Government loans (later granted) without even reading the statutes and regulations which appeared on the form. Other Courts of Appeal have ruled on the False Claims Act in ways that support the application sought here. 31 U.S.C. § 231 makes "fraud" of some sort the basis of the liability, and uses the word in its accepted sense of deceit. *United States ex rel Brensilber v. Bausch & Lomb Optical Co.*, 131 F.2d 545 (CA 2, 1942), *aff'd.* 320 U.S. 711, 64 S.Ct. 187, 88 L.Ed. 417, *reh. den.* 320 U.S. 814, 64 S.Ct. 256, 88 L.Ed. 492. Fraud implies either an express or implied misrepresentation of material fact. *United States v. Klein*, 230 F.Supp. 426 (W.D. Pa. 1964), *aff'd. per curiam*, 356 F.2d 983 (CA 3, 1966).

(C) The Court Of Appeals Has Decided A Federal Question In A Way That Conflicts With Applicable Decisions Of This Court.

At 557 F.2d 460, the Court of Appeals relies on *dicta* in an inapposite case decided by this Court nearly

twenty years ago, *United States v. McNinch*, 356 U.S. 595, 78 S.Ct. 950, 2 L.Ed.2d 1001, 1958, for the proposition that

> "(t)he False Claims Act was not designed to reach every kind of fraud practiced on the Government. The statute is primarily directed against government contractors' billing for non-existent or worthless goods or charging exorbitant prices for delivered goods."

In *McNinch*, the Government had not parted with any money under the FHA contract of insurance defendants obtained by fraudulent statement to a lender bank. Here the Government has paid respondent substantial sums of money on billings under its contracts. At 557 F.2d 460 the Court of Appeals noted the careful scrutiny called for in *United States ex rel Marcus v. Hess*, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 442, 1943, to determine whether alleged misconduct falls within the prohibitions of 31 U.S.C. § 231. In that case however this Court reversed a Court of Appeals to reinstate a district court judgment against defendants, rejecting an interpretation made with "utmost strictness" not only because of the penal nature of the act there in question but because *qui tam* actions were, supposedly, to be viewed with disfavor. The statutory construction in *United States ex rel Marcus v. Hess*, *supra*, appears more pertinent to § 5438 of the Revised Statutes (then 18 U.S.C. §§ 80, 82-86, now 18 U.S.C. §§ 287, 1001) rather than to §§ 3490-3493 of the Revised Statutes (31 U.S.C. §§ 231-234). Much more recently, this Court said in *United States v. Neifert-White Co.*, 390 U.S. 228, 232, 88 S.Ct. 959, 961-962, 19 L.Ed.2d 1061,

1968 of a case cited by the Fifth Circuit Court of Appeals that

> ". . . (i)n the various contexts in which questions of the proper construction of the (False Claims) Act have been presented, the Court has consistently refused to accept a rigid, restrictive reading, *even at a time when the statute imposed criminal sanctions as well as civil*. See, e.g., *United States ex rel Marcus v. Hess*, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1943)." (emphasis supplied)

(D) The Opinion Of The Court of Appeals Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

At 557 F.2d 462-463, the Court of Appeals imputes to a majority of the 52d Congress the opinion of the sponsor of a rejected amendment, to establish the intent of that body as not being directed at 'legitimate use of Pinkerton detectives as such.' This is a serious departure from all commonly accepted principles of statutory construction warranting the intervention of this Court. The O'Neill amendment would have prohibited the Government from contracting with organizations employing Pinkerton *guards*. While it is true the O'Neill amendment was rejected for this breadth (since Government contractors obviously had a need to protect property), it is also true that *nothing in the legislative history of the "anti-Pinkerton" act indicates it was not intended as remedial legislation to*

curb any and all ills which might arise from Government dealings with detective agencies. It is the height of unreason to conclude that Congress intended to deny the Government (which had never abusively employed strikebreakers) the ability to engage armed guards from detective agencies while permitting Government contractors (some of whom were guilty of the ills complained of) to do so on subcontracts! See 26 CompGen 303 (1928) permitting such employment.

At 557 F.2d 461, the Court of Appeals said:

> "The principal thrust of Weinberger's allegations fall into this category: that Equifax misrepresented its qualifications for government employment and thus made a false claim. But to establish that Equifax committed fraud in this manner, Weinberger must first demonstrate that the Government was misled by Equifax's application for the reporting business. Unless the government made it clear that it would not employ detective agencies when it contracted for the work, Equifax's application did not make a material misrepresentation, did not mislead the government, and did not defraud the government within the meaning of the False Claims Act. Weinberger does not allege that the government required applicants to represent that they were not detective agencies; no misrepresentation is alleged."

There are a number of things wrong with this. In view of its construction of 5 U.S.C. § 3108, there was no necessity for the Court of Appeals to reach an interpretation of the False Claims Act at all. The language of 31 U.S.C. § 231, Appendix B herewith at pp. 22-A — 23A, in respect to fraudulent claims is not so narrow as to require the claimant to represent that his product or service conforms to substantive, statutory law. The Court of Appeals has found as adjudicative fact that respondent made no material misrepresentations to the Government without even examining what respondent told the Government in bidding for work, or knowing the state of respondent's knowledge as to the substantive prohibition on detective agencies when it billed the Government and when it accepted payment on those bills. The district court never made any such finding of controlling fact (as to which a jury trial had been requested). With respect to resolving questions of fact, it is not properly in the domain of a Court of Appeals to find adjudicative facts in the first instance. Its function is limited to reviewing findings of determinative issues of fact in light of the evidence presented in the district court. The Court of Appeals should have distinguished between an *application* for Government business and the receipt of *payments* by respondent after grant of such application, but it did not do so. The interpretation by the Court of Appeals of the False Claims Act not only contravened precedent of this Court, *ante*, at pp. 20-21, and decisions of other Courts of Appeal, *ante*, at 18-19, but is inconsistent with the Fifth Circuit's own interpretations of that legislation. In *United States v. Ridglea State Bank*, 357 F.2d 495, 497 (CA 5, 1966), the Fifth Circuit Court of Appeals showed it recognized the limits of this Court's decision in *United States v. McNinch*, 356 U.S. 595, 78 S.Ct. 950, 2 L.Ed.2d 1001, 1958 (yet the Fifth Circuit relied on *dicta* from *McNinch* in this case. 557 F.2d at 460). The Fifth Circuit has also said that

"(t)he mere fact that the item supplied under the contract is as good as the one contracted for does not relieve defendants of liability if it can be shown that they attempted to deceive the government agency . . . Although the substitute generators (in *United States v. National Wholesalers*, 236 F.2d 944 (CA 9, 1956), *cert. den.* 353 U.S. 930, 77 S.Ct. 719, 1 L.Ed.2d 724, 1957) performed according to contract specifications, liability under the False Claims Act was held to attach because of the deliberate misbranding." *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1007-1008 (CA 5, 1972).

Under 18 U.S.C. § 1001, one of the two *criminal* statutes which parallel the False Claims Act, the Fifth Circuit Court of Appeals has said it is not necessary that a government agency must actually be deceived, but that it is only required the fraud in question have the natural tendency to influence, or be capable of affecting or influencing, governmental function. *United States v. Markham*, 537 F.2d 187 (CA 5, 1976), *reh. den.*, 540 F.2d 1086.

The Court of Appeals read this unusual complaint only selectively. At 557 F.2d 460, it wrote: "no one has suggested that Equifax's reporting activities for the government were not properly carried out." Paragraph 14 of the complaint as amended, Rec. at pp. 12-13, App. pp. 12-13, alleges shortcomings in respondent's Government work. Footnote 3 to the opinion of the Fifth Circuit Court of Appeals, 557 F.2d at 460, overlooks allegations of the complaint as to *threatened* injury by respondent arising from its in-

sistence on secrecy and non-disclosure by all of its clients, governmental or not. See, *inter alia*, complaint at ¶ 7, Rec. and App. at p. 5, ¶ 13, Rec. and App. at p. 11, and Count III as amended, Rec. p. 80, App. p. 21. Principles of equity should dictate that standing not be denied a party whose adversary's conduct has impeded or prevented a clear demonstration of the basis for standing.

Footnote 6 at 557 F.2d 463 downplays the role of a major Government official's authorized decisions, without discussion. The Court of Appeals opinion also fails to explain why "(i)n this case the False Claims Act is not an enforcement device for the "Anti-Pinkerton Act," 557 F.2d 461. Why not? The Government has shown no inclination to apply the substantive law in 5 U.S.C. § 3108 to respondent when it has consistently brought smaller, less influential bidders and vendors within that prohibition. And, much more importantly, petitioner has not attempted to usurp the authority of the United States to prosecute criminal matters by coupling the False Claims Act to penal statutes as was attempted in *Reuss v. Moss-America, Inc.*, 323 F.Supp. 848 (DC ED Wis. 1971); *Bass Anglers Sportsman's Society v. United States Plywood-Champion Papers, Inc.*, 324 F.Supp. 302 (SD Tex. 1971); *United States qui tam Matthews v. Florida Vanderbilt Development Corp.*, 326 F.Supp. 289 (SD Fla. 1971) and *United States ex rel Mattson v. Northwest Paper Co.*, 327 F.Supp. 87 (D. Minn. 1971) [attempts to collect criminal fines from polluters under the Rivers & Harbors Appropriations Act of 1899]. The unwillingness of the Court of Appeals to entertain the False Claims Act as a vehicle for enforcing the "anti-Pinkerton" statute gives the Government the power to ignore the

Congressional will, hardly a reasonable result. Yet the False Claims Act has been used in conjunction with other non-penal statutes. *See* Qui Tam Suits Under the Federal False Claims Act: Tool of the Private Litigant in Public Actions, 67 Northwestern L.Rev. 446 (1972).

The Court of Appeals panel which considered this case was one convened to attack a backlog of civil cases. It consisted of only one *active* circuit judge (author of the opinion) and included a *retired* district judge from another district in respondent's home state (Georgia). The likelihood of a spirited debate among members of this panel as to the important questions presented by this action was not great. Moreover, it does not appear that the author of the opinion by the Court of Appeals had any prior service as a district judge. Analysis of the Court of Appeals' opinion in its entirety leads to one of two conclusions: (*1*) the panel did not function as intended in an appeal as of right, or (*2*) the opinion displays a bias against the merits of petitioner's admittedly unusual arguments. Only shortly before, its author participated in an unexplained *per curiam* affirmance on another unusual claim by petitioner, *Weinberger v. United States*, USCA 5 # 76-4365, *aff'd per curiam*, 555 F.2d 1390 (July 5, 1977), *reh. and reh. en banc den.*, 559 F.2d 401, U.S.S.Ct. # 77-138, cert. den. 46 U.S.L.W. 3240 (Oct. 11, 1977), *petition for rehearing filed* Nov. 4, 1977.

CONCLUSION

Recent national history teaches that the 52d Congress, when enacting the "anti-Pinkerton" statute,

now 5 U.S.C. § 3108, could reasonably have foreseen other ills besides abusive hire of armed guards which could result from Government involvement with detective agencies. This act should be broadly construed as the remedial legislation Congress intended it to be, in the manner the Comptroller General and other officers of the Government have interpreted it. At 557 F.2d 462, the Court of Appeals states that Congress enacted a *broad proscription* against Government employment of a class. The question is thus whether 5 U.S.C. § 3108 is correctly interpreted by the Comptroller General as a proscription against Government contracts with *investigative* enterprises for *any* purpose, or whether the prohibition extends only to a class of organizations furnishing 'quasi-military, mercenary forces' as strikebreakers or armed guards. If the latter, the "anti-Pinkerton" act is now a nullity. This is not reasonable in view of its recodification into positive law in 1966 and a number of subsequent Congressional refusals to amend or repeal the ban. It is illogical to construe the act, as the Court of Appeals has done, to prohibit the Government from doing that which its contractors may do (hire armed guards from detective agencies to protect property or control public gatherings, protests or unrest) when the contractors rather than the Government were the cause of this legislation in the first instance. The narrow construction of 5 U.S.C. § 3108 by the Court of Appeals, if applied to other statutes in the United States Code, would prevent federal law from keeping up with the times. That construction ignores legal philosophy of the kind expressed by Mr. Justice McKenna in *Weems v. United States*, 217 U.S. 349, 373, 30 S.Ct. 544, 54 L.Ed. 793 (1919):

> "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore be necessarily confined to the form that the evil had taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be viral must be capable of wider application than the mischief which gave it birth."

In order to find respondent not subject to the mandate of 5 U.S.C. § 3108 on the basis of all applicable Comptroller General decisions (save the one which caused this lawsuit), the Court of Appeals had to overrule those decisions. It did so in a grossly inappropriate way (footnote 6 at 557 F.2d at 463), ignoring the special status of the Comptroller General as an agent of Congress empowered to 'determine the extent to which Government financial transactions have been consummated in accordance with laws, regulations or other legal requirements, 31 U.S.C. § 65(d). Out went the baby (weight in general to be given Comptroller General decisions by the federal courts) with the bath water (his consistent line of decisions with but one deviation that would make the prohibition applicable to respondent), despite the lack of a compelling or valid reason why those decisions should be entitled to any less weight than Congressionally-authorized administrative agency constructions of substantive federal laws. Both the district court and the Court of Appeals in dismissing and affirming rely on the doubtful authority of *United States ex rel Brookfield Construction Co. v. Stewart*, 235 F.Supp. 94 (D.D.C., 1964), *aff'd per curiam*, 339 F.2d 753 (C.A.D.C., 1964). After Congress appointed the

Comptroller General as its agent in 1950 and had earlier placed his General Accounting Office in the legislative branch, the *Stewart* opinion described him as both an executive and legislative official who is not a law officer. Clearly Congresss intended from its words in 31 U.S.C. § 65(d) that he render legal opinions as to matters of Government spending. The question of how the deceptively simple "anti-Pinkerton" act is to be construed and the issue of the weight to be accorded Comptroller General decisions are important matters worthy of the attention of this Court, because of the far-reaching implications of both.

Anticipating a contention that somehow a "consumer reporting agency" is not subject to the prohibition of 5 U.S.C. § 3108, petitioner's principal brief on appeal (at pages 52-60) contended that the Fair Credit Reporting Act and the "anti-Pinkerton" statute do not regulate precisely the same subject matter, and are thus not *in pari materia*. After the passage of the Fair Credit Reporting Act, respondent has held itself out as a reporter of 'information for business decisions' since the American public would still not easily understand why "consumer reports" (especially the investigative kind) delve so deeply into highly personal and private matters. This further confuses the distinction between detective and consumer reporting agencies, with a faint suggestion of respondent being a third kind of agency: a reporter of *business and trade credit information* which is exempt from regulation by the Fair Credit Reporting Act. Appellant's principal brief at pages 61-68 sought to show that application of 5 U.S.C. § 3108 to the circumstances of *this particular* consumer reporting agency would neither produce an absurd result nor one beyond the spirit or

intent of the 52d and a number of subsequent Congresses.

In view of its interpretation of the prohibition embodied in 5 U.S.C. § 3108, there was no need for the Court of Appeals to concern itself with the False Claims Act, 31 U.S.C. §§ 231 *et seq.* The Court of Appeals ignored precedents of its own, other Courts of Appeal and this Court's interpretations of the False Claims Act by rendering this gratuitous part of its decision. The wording of 31 U.S.C. § 231 in respect to fraudulent claims is not so narrow as to require a vendor's certification of compliance with a substantive federal statute. The Court of Appeals erred in finding no fraudulent claim as a matter of law, and/or it made a finding of controlling, adjudicative fact not established in the district court as to respondent's knowledge of and care to ascertain substantive federal law *when it accepted payments on its billings.*

The question of standing in connection with the declaratory relief sought in this case is one of first impression which also warrants this Court's attention, because of its effects on those who would litigate in behalf of a larger interest than merely their own. There is a basis in existing federal case law on standing to suggest that a party possessed of standing by act of Congress to seek broad relief also has standing to seek declaratory remedies which are arguably within the zone of interest to be protected by such statute. The usefulness of the False Claims Act becomes much more severely limited than Congress probably intended if it cannot be employed to seek declaratory judicial action (short of making out a false, fraudulent or fictitious claim) where compliance with a substantive federal law is at issue. Protection against misuse of the False Claims Act if it were to be applied in this manner lies within the statutory wording itself and judicial interpretations thereof: the informer must present evidence not possessed by the Government when suit is brought [31 U.S.C. § 232(C)] unless he charges collusion of Government personnel, *United States v. Rippetoe*, 178 F.2d 735 (CA 4, 1949), and such claims may not be prosecuted by persons lacking legal background or representation, *United States v. Onan*, 190 F.2d 1 (CA 8, 1951).

Taken as a whole, this opinion reflects the dreadful state of affairs presently existing in the United States Fifth Circuit Court of Appeals as a result of manifest, patent judicial understaffing. The importance of the questions presented by this case warrants this Court's review not only on the merits of those matters, but as an exercise of this Court's supervisory power over inferior federal judicial tribunals.

Respectfully submitted,

_____

David P. Weinberger

APPENDIX A

In the United States District Court
for the Southern District of Florida

UNITED STATES OF AMERICA, on the relation of David P. Weinberger, and DAVID P. WEINBERGER,
Plaintiff,

vs. CA NO. 75-526-Civ-WM

RETAIL CREDIT COMPANY,
Defendant.

ORDER OF DISMISSAL

This Cause came before the Court upon a Motion To Dismiss Amended Complaint filed on behalf of the defendant, Retail Credit Company. The defendant had previously filed a Motion To Dismiss the original Complaint. Plaintiff Weinberger, without leave of Court, then filed an Amended Complaint. Notwithstanding plaintiff's failure to comply with Rule 15 of the Federal Rules of Civil Procedure, the Court will address itself to the sufficiency of the Amended Complaint on its merits, and not its timeliness or the lack thereof.

In support of its motion, the defendant asserts that the Amended Complaint fails to state a claim upon which relief can be granted, that the plaintiff, David P. Weinberger, has no standing to bring this lawsuit, and that the United States of America has not been joined as an indispensable party.

This Court has considered the motion and legal memoranda submitted by both sides with intense

scrutiny, as motions to dismiss for failure to state a claim are viewed with disfavor and should rarely be granted. *Rios* v. *Dillman*, 499 F.2d 329 (5th Cir. 1974). However, there is a time and place for motions to dismiss when used with care. *Cook & Nichol, Inc.* v. *Plimsoll Club*, 451 F.2d 505 (5th Cir. 1971). In other words, this Court will dismiss a cause under Rule 12(b) only with great hesitation and reluctance.

It appears to the Court that, in the instant case, the plaintiff, Weinberger, has failed to state a claim upon which relief can be granted and that he lacks standing to bring this lawsuit under the United States Code or Constitution.

Counts I, II and IV of the Amended Complaint are essentially based on 5 U.S.C. § 3108, the so-called "anti-Pinkerton Act." Plaintiffs seeks to have the defendant declared a detective agency within the meaning of 5 U.S.C. § 3108, which prohibits the employment by the United States Government of an individual employed "by the Pinkerton Detective Agency or a similar organization."

This Court is mindful of the admonition offered in *Shull* v. *Pilot Life Insurance Company*, 313 F.2d 445 (5th Cir. 1963), to the effect that extreme or far-fetched legal theories should be explored and assayed in light of actual facts. Having examined the legislative history of 5 U.S.C. § 3108, it is clear to this Court that the statute was enacted to prohibit the use of detective agents by the federal government during labor disputes. Agencies such as the defendant in this case clearly were not intended to come within the scope of this statute. Retail Credit is a credit investigative

agency. Plaintiff's attempt to invoke 5 U.S.C. § 3108 for the purpose of bringing this lawsuit is novel and extreme, but plaintiff has alleged no facts which indicate that the defendant has provided manpower to the United States Government in connection with a labor dispute. Therefore, plaintiff's attempt to state a claim in Counts I, II and IV of the Amended Complaint under 5 U.S.C. § 3108 is unsuccessful.

Plaintiff has also failed to state a claim in Count IV of the Amended Complaint to the extent that Count IV alleges that the defendant received payment from the United States for "false, fraudulent and unlawful claims" in violation of 31 U.S.C. § 231. The claims of defendant are assertedly false because they are based on contracts prohibited by the "anti-Pinkerton Act." The Court has already pointed out that agencies such as the defendant do not lie within the scope of 5 U.S.C. § 3108. Therefore, plaintiff's claim under 31 U.S.C. § 231 is equally without merit since it is derived from 5 U.S.C. § 3108. In this regard, it should be pointed out that Count IV may properly be dismissed as the United States Attorney has declined to participate in any aspect of this action pursuant to 31 U.S.C. § 232(c).

In addition to the insufficiency of the Complaint, this Court finds that the plaintiff lacks standing to bring any of the claims asserted in this lawsuit. The test for standing under Article III of the United States Constitution has been formulated in *Data Processing Service* v. *Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), as noted in *Johnson* v. *Morton*, 456 F.2d 68 (5th Cir. 1972). The relevant issues for determining standing are:

1. Whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise. *Data Processing, supra,* at 152.

2. Whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. *Data Processing, supra,* at 153.

To establish standing to sue under federal statutes, plaintiff must meet both of these tests. In this case, plaintiff has presented claims derived from 5 U.S.C. § 3108, 31 U.S.C. § 231 and 232, 15 U.S.C. § 1681 and the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. Nowhere in the Amended Complaint, however, does plaintiff allege any "injury in fact, economic or otherwise," arising from the violation of the above statutes and constitutional provisions. He states only that his standing "arises from federal employment applications submitted to the United States Civil Service Commission, the Commission's request for consent from the plaintiff to conduct a background investigation on him . . . and the plaintiff's assent given in a letter to CSC . . ." (See Amended Complaint.) Plaintiff does not allege that his applications were rejected, that the information, if any, provided to the government by the defendant was the reason for the rejection, or any other injury resulting from acts attributable to the defendant.

This Court, then, in terms of Article III limitations on federal court jurisdiction, does not believe that the dispute sought to be adjudicated will be presented in

an adversary context and in a form historically viewed as capable of judicial resolution. *Flast* v. *Cohen,* 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

The Court shall not determine here whether this cause should also be dismissed for failure to join an indispensable party under Rule 19. The Assistant United States Attorney, having reviewed the Amended Complaint in this action, declined to participate on behalf of the plaintiff, Weinberger. This declination reflects the inadequacy of the Amended Complaint and of the plaintiff's standing.

This Court, for the above reasons, finds that all of the counts of the Amended Complaint should be dismissed for lack of standing. Dismissal of Counts I, II and IV is further supported by plaintiff's failure to state claims under these particular counts. Therefore, it is

ORDERED and ADJUDGED that this Cause be and the same hereby is DISMISSED without prejudice.

DONE and ORDERED at Miami, Florida, this 17th day of June, 1975.

/s/ W. O. MEHRTENS
UNITED STATES
DISTRICT JUDGE

cc: ASSISTANT U.S. ATTORNEY; SMATHERS & THOMPSON; DAVID WEINBERGER.

United States Court of Appeals
for the Fifth Circuit

October Term, 1976

No. 75-3491

D.C. Docket No. 75-526-Civ-WM

UNITED STATES OF AMERICA, ex rel. DAVID P. WEINBERGER, ET Al.,
Plaintiffs-Appellants,
versus

EQUIFAX, INC. (formerly Retail Credit Company),
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

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Before WISDOM and GEE, Circuit Judges, and BOOTLE,* District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed;

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* Senior District Judge of the Middle District of Georgia, sitting by designation.

It is further ordered that plaintiffs-appellants pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

August 12, 1977

Issued as Mandate:
(stayed thru Nov. 19, 1977 to permit filing petition for certiorari)

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[458] OPINION

(Number and Title Omitted)

David P. Weinberger, pro se.

Paul M. Stokes, Miami, Fla., for defendant-appellee.

On appeal from the United States District Court for the Southern District of Florida.

Before WISDOM and GEE, Circuit Judges, and BOOTLE, District Judge.

GEE, Circuit Judge:

In this appeal we review the district court's dismissal of plaintiff Weinberger's action, pursuant to Federal Rule 12(b)(6), for lack of standing and failure to state a claim. By his suit, Weinberger sought a declaratory judgment that government employment of Equifax, Inc. (formerly Retail Credit Co.) to provide information on prospective government employees violated the Anti-Pinkerton Act, 5 U.S.C. § 3108 (1970).[1] Weinberger also alleged that Equifax's billing

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1 For text of 5 U.S.C. § 3108, see Page 21-A.

of the United States for services performed violated the False Claims Act, 31 U.S.C. §§ 231-32 (1970),[2] asserting that [459] Equifax's billing of the United States for services performed in violation of the Anti-Pinkerton Act was a false claim. The district court dismissed the action, ruling that Weinberger had failed to allege essential facts under both actions and that, in any case, Weinberger lacked standing to bring either. Weinberger appeals these determinations and further asserts that the district judge should have stood recused.

The villain in Weinberger's scenario is Equifax, a corporation in the business of collecting and providing information for business decisions. Equifax's credit-reporting activities qualify it as a consumer reporting agency under the Fair Credit Reporting Act. *See* 15 U.S.C. § 1681a(f) (1970), but it also furnishes information concerning prospective customers and employees to businesses. On occasion, agencies of the United States have contracted with Equifax to gather information on prospective employees. Weinberger alleges that in collecting information, Equifax does not confine itself to examinations of files and public records; in some cases it uses investigative techniques similar to those employed by detective agencies. These alleged investigative techniques sparked this lawsuit.

In his action seeking a judgment declaratory of 5 U.S.C. § 3108, Weinberger asserts that because Equifax employs detective-like investigative techniques, it is an organization "similar" to the Pinkerton Detective Agency and thus barred from government employment by the Anti-Pinkerton Act. Wein-

2 For text of 31 U.S.C. §§ 231, 232 see Pages 22-A through 27-A.

berger lacks standing to assert this claim. To have standing, Weinberger must assert a personal stake in the outcome "warranting *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). Under *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), standing turns on "whether the plaintiff alleges that the challenged action has [460] caused him injury in fact, economic or otherwise . . . ," *id.* at 152, 90 S.Ct. at 829, and whether "the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." Weinberger fails to satisfy the first requirement because he has alleged no injury in fact.[3]

Weinberger's *qui tam* action under the False Claims Act, however, fares somewhat better here than it did in the district court. The district court ruled that Weinberger lacked standing to assert his informer's suit, that he had failed to comply with procedural requirements of the Act, and that he had failed to state a

3 Weinberger's complaint does state that at one time he applied to the United States Civil Service Commission for employment, that the Civil Service requested permission to conduct a background investigation on him in connection with the position of Assistant Appeals Officer, and that he gave his assent to that background investigation. It does not allege that Equifax was employed to conduct a background investigation on him or that he was injured in any way by the background investigation. Thus, Weinberger's only interest is one shared with other citizens that the government follow its laws, but this "generalized grievance" shared with other citizens does not confer standing or support the invocation of federal jurisdictions. *See Warth v. Seldin, supra*, 422 U.S. at 499, 95 S.Ct. 2197. The personal interest he alleges is too tenuous and undifferentiated from the interests of others to afford him standing. Of course, the fact that Weinberger seeks a declaratory judgment action provides no jurisdictional help if he lacks standing to seek any sort of relief. *See Red Lobster Inns of America, Inc. v. New England Oyster House, Inc.*, 524 F.2d 968, 969 (5th Cir. 1975) (per curiam); 10 C. Wright & A. Miller, Federal Practice & Procedure: Civil §§ 2766, 2767 (1973).

claim under the Act. We hold that Weinberger had standing under the False Claims Act and properly pursued the action, but we agree with the district court that he failed to state a claim under the Act.

In 31 U.S.C. § 232 (1970), Congress specifically provides for informer's suits. It grants informer standing to sue and an award for successful action under the statute. *See* 31 U.S.C. § 232(B) and (E)(2) (1970). To maintain the action the informer is required only to notify the United States of the suit. The United States may then choose whether to join the action. If it elects not to enter an appearance, the informer's suit may continue. *See* 31 U.S.C. § 232(C) (1970). A jurisdictional requirement of the informer's suit is that it must rest on information not in the possession of the United States prior to filing the action. *See* 31 U.S.C. § 232(C) (1970). None of these procedural requirements doom Weinberger's action.

After Weinberger filed his informer's action, he notified the United States of his suit. And though the United States elected not to join, his action was not affected by this. *See* 31 U.S.C. § 232(C) (1970). The statute clearly accords him standing to bring the action so long as he predicates his claim on information not in the possession of the United States at the time of his suit. *Id.* At no time has Equifax suggested that the information essential to Weinberger's suit was already in the possession of the government. The district court erred in holding that Weinberger lacked standing and had failed to meet procedural requirements.

Nevertheless, Weinberger still fails to state a claim under the False Claims Act. That Act prohibits false or fraudulent claims to government payment. The penal nature of the statute requires careful scrutiny to see if the alleged misconduct violates the statute. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542, 63 S.Ct. 379, 87 L.Ed. 443 (1943). The False Claims Act "was not designed to reach every kind of fraud practiced on the Government." *United States v. McNinch*, 356 U.S. 595, 599, 78 S.Ct. 950, 2 L.Ed.2d 1001 (1958). The statute is primarily directed against government contractors' billing for non-existent or worthless goods or charging exorbitant prices for delivered goods. *Id.* Equifax plainly did not submit a false claim under this reading of the statute: no one has suggested that Equifax's reporting activities for the government were not properly carried out. Weinberger has alleged no false claim in this sense.

[461] The statute also interdicts material misrepresentations made to qualify for government privileges or services. *See, e. g., Alperstein v. United States*, 291 F.2d 455, 456 (5th Cir. 1961) (per curiam) (veteran violated False Claims Act when, to qualify for federal benefits, he falsely swore that he was financially unable to bear medical expenses); *United States v. Johnson*, 138 F.Supp. 525, 527-28 (W.D.Okla. 1956) (physician misrepresented competency and general qualifications to gain employment with Air Force). The principal thrust of Weinberger's allegations fall into this category: that Equifax misrepresented its qualification for government employment and thus made a false claim. But to establish that Equifax committed fraud in this manner, Weinberger first must demonstrate that the government was misled by

Equifax's application for the reporting business. Unless the government made it clear that it would not employ detective agencies when it contracted for the work, Equifax's application did not make a material misrepresentation, did not mislead the government, and did not defraud the government within the meaning of the False Claims Act. Weinberger does not allege that the government required applicants to represent that they were not detective agencies; no misrepresentation is alleged. In this case the False Claims Act is not an enforcement device for the Anti-Pinkerton Act. Weinberger has failed to allege a claim under the False Claims Act.

Even had Weinberger alleged, however, that the government did make nondetective agency status a prerequisite to a reporting contract, Weinberger would still have failed to state a claim because we conclude that he has not alleged facts bringing Equifax under the proscriptions of the Anti-Pinkerton Act. Weinberger has not alleged facts indicating that Equifax operates like the Pinkerton Detective Agency did in 1892 — *i. e.*, that it is a general detective agency, that it provides watchmen for plants and buildings, and that it offers for hire a mercenary, quasi-military armed force.

The Anti-Pinkerton Act is an expression of legislative frustration. In the 1890's, the nascent labor movement was increasingly involved in sometimes violent confrontations with factory owners over wages and working conditions. When the owners' resort to legal remedies proved fruitless or when the local police force was ineffectual in handling strikes, owners frequently engaged the Pinkerton Agency to

supply large bodies of armed men to discourage strikers from interfering with the orderly operation of business. One particularly violent and bloody confrontation occurred in Homestead, Pennsylvania, when the Amalgamated Association of Iron and Steel Workers struck a Carnegie Steel Mill. Managers of the mill employed an armed force of 300 Pinkertons to protect the mill. As the Pinkertons approached the mill, floating on barges down the Monongahela River, a firefight ensued between them and strikers on the banks. Numerous injuries and some deaths resulted from this struggle. The Homestead incident prompted congressional investigations on ways to prevent employers' reliance on Pinkertons to solve labor disputes. *See* S. Rep. No. 1280, 52d Cong., 2d Sess. (1893); H. Rep. No. 2447, 52d Cong., 2d Sess. (1893). Although Congress wished to ban the employment of Pinkertons as a private mercenary force, it concluded that it lacked the power to enact such a ban and looked to the states to control Pinkerton conduct. *See* H. Rep. No. 2447, 52d Cong., 2d Sess., p. XVI (1893).

But it did feel empowered to do something. Simultaneously with its investigation of the Pinkertons, Congress was discussing the 1892 civil appropriations bill. Representative O'Neill of Missouri offered an amendment to prevent the government from contracting with entities that employed "Pinkerton detectives or any other association of men as armed guards" and to prevent the government itself from employing the Pinkerton Detective Agency or any similar agency. When the Senate refused to accept the amendment, viewing the first proscription as too broad, the conference committee deleted it but retained a reword- [462] ed version of the second provi-

sion in the 1892 bill. The proscription would have expired with that appropriations bill, but in 1893 Congress made the restriction permanent.[4]

The district court, after reviewing the legislative history, concluded that the Anti-Pinkerton Act prohibited only government use of detectives during labor disputes. Although it is true that the impetus for the Anti-Pinkerton Act arose from the employment of armed guards in labor disputes, the congressional enactment banning Pinkerton employment must be read more broadly. Congress clearly generally intended to prohibit employment by the government of the Pinkerton Agency as then constituted, or any similar agency. In this sense, the district court erred in its restrictive interpretation of the Anti-Pinkerton Act.

Weinberger urges that Equifax is an organization similar to the Pinkerton Detective Agency, but his allegations fall short of those required by the Act. Weinberger alleges that Equifax operates like a detective agency and that it even considers the present-day Pinkerton Agency a competitor. Yet the nature of the statute directs us, not to the present-day Pinkerton Agency for comparison, but to the agency as it existed in 1892. Congress enacted a broad proscription against government employment of a class. Rather than specifically defining the class, it used one example by which others falling in the class could be identified. We cannot change that definition by looking to

4 Our description of congressional action surrounding the passage of the Anti-Pinkerton Act is derived from S. Rep. No. 447, 88th Cong., 1st Sess. (1963), a report on a bill to repeal the Anti-Pinkerton Act.

the example organization as it presently exists.[5] We must look to the Pinkerton Detective Agency *as it existed* when Congress used it as a definitional example in 1892 to decide which organizations are "similar" to the kind proscribed for employment.

The purpose of the Act and the legislative history reveal that an organization was "similar" to the Pinkerton Detective Agency only if it offered for hire mercenary, quasi-military forces as strikebreakers and armed guards. It had the secondary effect of deterring any other organization from providing such services lest it be branded a "similar organization." The legislative history supports this view and no other.

In investigating the Homestead incident, the Senate Report clearly distinguished between types of detective agencies:

> Some of them confine their operations to detective business, others furnish patrolmen to protect private property during the night, acting in harmony with the police force, while a few of them add to that kind of work the business of supplying armed men on occasions of strikes . . . .

5 Such a construction, for example, would ban employment by the government of any organization furnishing, say, babysitting services, if Pinkerton had changed its business purpose to this at the relevant time. Or, had the Pinkerton Agency gone out of existence, it might be thought to ban employment of defunct organizations only.

S. Rep. No. 1280, p. II (Feb. 10, 1893). In his amendment to the 1892 appropriations act, Representative O'Neill urged the language "Pinkerton detectives or any other association of men as armed guards" in his proposed prohibition of the employment of government contractors that used Pinkertons. It is true, as Weinberger argues, that this portion of O'Neill's amendment was disapproved by the Congress, but only because of its fear that the prohibition was too broad, not because of its more specific reference to the "armed guard" aspect of the Pinkerton Agency's activities. In fact, the explanation for Congress' action on this matter given by the ranking member of the House Conference Committee, Representative Holman, provides further support for our reading:

> [T]he original proposition adopted by the House was a very broad one. It not only prohibited the employment of the *Pinkerton force or any similar quasi-military* [463] *organization* by any officer of the Government or the District of Columbia, but it prohibited the employment of such force by an individual, firm, or corporation having contracts with the United States.

S. Rep. No. 447, 88th Cong., 1st Sess. (Aug. 20, 1976) (including description of 1893 conference) (emphasis supplied). Representative O'Neill's response to Mr. Holman further highlights the intent of the congressional originator of the Anti-Pinkerton Act:

> [D]oes not the gentleman from Indiana (Mr. Holman) well know that *nobody objects to the legitimate use of Pinkerton detectives as such.*

> *It is their use as armed guards that is objected to,* and it is the sending of their armed guards from one state into another that is objected to
> . . . .

In light of the purpose of the Act and its legislative history, we conclude that an organization is not "similar" to the (quondam) Pinkerton Detective Agency unless it offers quasi-military armed forces for hire. Because Weinberger fails to allege that Equifax provides so much as an armed guard,[6] much less an armed quasi-military unit, Equifax's employment is not illegal under the Anti-Pinkerton Act. Thus, Weinberger fails to state a false claim under the False Claims Act.

Weinberger also appeals the district judge's failure to stand recused after discovering that his son was an associate of the law firm representing Equifax. Weinberger reinforces the suggestion of partiality by alleging other supposed instances of bias or prejudice by the district judge. For example, Weinberger protests that the court entered an order of dismissal only four days after Equifax filed a motion to dismiss the

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6 Weinberger invokes a long line of Comptroller General decisions holding that the Anti-Pinkerton Act bars the employment of any detective agency in any capacity. *See, e. g.*, 71 M.S.Comp.Dec. 488 (1914); 38 Comp.Gen. 881 (1959). These decisions resulted from the Comptroller's determination, in his executive capacity, that certain payments by disbursing officers would be passed or disallowed. These decisions do not have the force of administrative interpretations by agencies empowered by Congress to interpret statutes, and we are not bound by them. *See United States ex rel. Brookfield Construction Co. v. Stewart*, 234 F.Supp. 94, 99-100 (D.D.C.), *aff'd per curiam*, 119 U.S.App.D.C. 254, 339 F.2d 753 (1964). Although we respect the Comptroller's efforts, our reading of the statute and its legislative history leads us to a different conclusion.

amended complaint and before Weinberger could file a reply memorandum. Weinberger also complains of comments by the district judge denigrating plaintiff's complaint. In our view, however, the most serious claim is that the district judge's son was associated with the defendant's legal counsel.

The current statute providing for disqualification of a judge for bias suggests that he "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," 28 U.S.C. § 455(a), and that he must disqualify himself if he or his spouse or a "person within the third degree of relationship" is acting as a lawyer in the proceeding, 28 U.S.C. § 455(b)(5)(ii), or has a financial interest in the outcome of the proceeding, 28 U.S.C. § 455(b)(5)(iii). None of the provisions requiring recusal apply here. It is undisputed that the district judge's son did not actively participate in Equifax's defense. That the son's law firm participated in the proceeding does not mean that he was "acting as a lawyer in the proceeding." *See SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir., 1977). That provision requires actual participation. The fears of judicial bias that might result from an offspring's active participation in a proceeding do not merit automatic disqualification of the law firm to which the relative belongs. The "financial interest" provision might apply if the district judge's son were a partner in the firm. But his status as an associate removes that fear. *See id.* His salary interest as an associate is too remote to fall under this "financial interest" prohibition.

Although none of these matters require disqualification, they are considerations [464] that might

move the district judge to examine "whether his impartiality might reasonably be questioned." He should determine whether a reasonable man would conclude that the district judge should recuse himself. *See Parrish v. Board of Commissioners*, 524 F.2d 98, 103 (5th Cir. 1975); *Davis v. Board of School Commissioners*, 517 F.2d 1044, 1052 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). The district judge examined Weinberger's assertions that recusal was appropriate but perceived no justification for removing himself. On appeal, we review the district judge's determination for abuse of discretion. *See Davis, supra* at 1052. We find no abuse here of the district judge's conclusion that his impartiality could not reasonably be questioned.

Thus, we conclude that the district court correctly determined that Weinberger lacked standing to assert a direct action for violation of the Anti-Pinkerton Act but erred in denying him standing under the False Claims Act. Nevertheless, Weinberger failed to state a claim under the False Claims Act for two reasons: first, even granting an Anti-Pinkerton Act violation, Weinberger's action based on that violation did not state a "false" claim; and second, Weinberger failed to allege facts bringing the defendant within the Anti-Pinkerton Act proscription and thus failed to form the basis for his false claim. Finally, the district judge did not abuse his discretion in declining to stand recused. The district court's order of dismissal is

AFFIRMED.

In the United States Court of Appeals
for the Fifth Circuit

No. 75-3491

UNITED STATES OF AMERICA, ex rel DAVID P. WEINBERGER, ESQ., ET AL.,
Plaintiffs-Appellants,
versus

EQUIFAX, INC. (formerly Retail Credit Company),
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC (Opinion August 12, 1977, 5 Cir., 1977, 557 F.2d 456).

(October 4, 1977)

Before WISDOM and GEE, Circuit Judges, and BOOTLE,* District Judge.

PER CURIAM:

The Petition for Rehearing on behalf of appellant David P. Weinberger is DENIED and no member of this panel nor Judge in regular active service on the

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* Senior District Judge of the Middle District of Georgia sitting by designation.

Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:
/s/ ILLEGIBLE
United States Circuit Judge

APPENDIX B

Title 5, Section 3108, United States Code:
[Source: I U.S. Code 228 (1970);
5 U.S.C.A. 380]

§ 3108. Employment of detective agencies; restrictions

An individual employed by the Pinkerton Detective Agency, or similar organization, may not be employed by the Government of the United States or the government of the District of Columbia.
Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 416.

Title 31, Section 65(d), United States Code:
[Source: VII U.S. Code 8274 (1970);
31 U.S.C.A. 68]

§ 65. Congressional declaration of policy

It is the policy of the Congress in enacting this chapter that —

* * * *

(d) The auditing for the Government, conducted by the Comptroller General of the United States as an agent of the Congress be directed at determining the extent to which accounting and related financial reporting fulfill the purposes specified, financial transactions have been consummated in accordance with laws, regulations or other legal requirements, and adequate internal financial control over operations is exercised, and afford an effective basis for the settlement of accounts of accountable officers.

Title 31, Section 231, United States Code:
[Source: VII U.S. Code 8317 (1970);
31 U.S.C.A. 333]

§ 231. Liability of persons making false claims

Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the Unit-

ed States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

Title 31, Section 232, United States Code:
[Source: VII U.S. Code 8317-8318 (1970);
31 U.S.C.A. 354-356]

§ 232. Same; suits; procedure

(A) The several district courts of the United States, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit.

(B) Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States, the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the United States attorney, first filed in the case, setting forth their reasons for such consent.

(C) Whenever any such suit shall be brought by any person under clause (B) of this section notice of the pendency of such suit shall be given to the United States by serving upon the United States attorney for the district in which such suit shall have been brought a copy of the bill of complaint and by sending, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia, a copy of such bill together with a disclosure in writing of substantially all evidence and information in his possession material to the effective

prosecution of such suit. The United States shall have sixty days, after service as above provided, within which to enter appearance in such suit. If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit: *Provided,* That if the United States shall fail to carry on such suit with due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court after notice may allow, such suit may be carried on by the person bringing the same in accordance with clause (B) of this section. The court shall have no jurisdiction to proceed with any such suit brought under clause (B) of this section or pending suit brought under this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought: *Provided, however,* That no abatement shall be had as to a suit pending on December 23, 1943, if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not therefore in the possession of the Department of Justice.

(D) In any suit whether or not on appeal pending on December 23, 1943, brought under this section, the court in which such suit is pending shall stay all

further proceedings, and shall forthwith cause written notice, by registered mail, or by certified mail, to be given the Attorney General that such suit is pending, and the Attorney General shall have sixty days from the date of such notice to appear and carry on such suit in accordance with clause (C) of this section.

(E)(1) In any such suit, if carried on by the United States as herein provided, the court may award to the person who brought such suit, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount which in the judgment of the court is fair and reasonable compensation to such person for disclosure of the information or evidence not in the possession of the United States when such suit was brought. Any such award shall in no event exceed one-tenth of the proceeds of such suit or any settlement thereof.

(2) In any such suit when not carried on by the United States as herein provided, whether heretofore or hereafter brought, the court may award to the person who brought such suit and prosecuted it to final judgment, or to settlement, as provided in clause (B) of this section, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount, not in excess of one-fourth of the proceeds of such suit or any settlement thereof, which in the judgment of the court is fair and reasonable compensation to such person for the collection of any forfeiture and damages; and such person shall be entitled to receive to his own use such reasonable expenses as the court shall find to have been necessarily incurred and all costs the court may award against the defendant, to be allowed and taxed

according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided,* That such person shall be liable for all costs incurred by himself in such case and shall have no claim therefor on the United States.

Title 31, Section 233, United States Code:
[Source: VII U.S. Code 8318 (1970);
31 U.S.C.A. 385-386]

§ 233. Duty of United States attorney as to such cases

It shall be the duty of the several United States attorneys for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section 231 of this title by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of $2,000, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

Title 31, Section 235, United States Code:
[Source: VII U.S. Code 8318 (1970);
31 U.S.C.A. 387]

§ 235. Limitation of suit

Every such suit shall be commenced within six years from the commission of the act, and not afterward.

APPENDIX C

THE WASHINGTON POST Monday, July 21, 1969 A 5

Hill Aide Prober Identified, Apologizes to Senate Panel

By Morton Mintz
Washington Post Staff Writer

The Nation's 89th largest industrial corporation has acknowledged that it ordered an investigation into the personal affairs of a Senate Finance Committee aide who had helped to draft legislation—opposed by the company—intended to lower the prices of prescription drugs to Government programs.

The Judge is the American Home Product Corp. in 1968 sales exceeding $1 billion were made by its numerous divisions. These include Ayerst Laboratories and Wyeth Laboratories, two leading makers of prescription drugs.

As disclosed by The Washington Post last Wednesday, the Committee aide, Jay B. Constantine, said that a company he declined to name had retained investigators to inquire of neighbors and fellow Capitol Hill employes about his personal finances and "mode of living."

The project for the investigation was let to the firm that made it, the Retail Credit Co., was that Constantine was looking for a new job. The same pretext was used in the Ralph Nader "snooping" episode.

Sources identified American Home as the sponsor of the inquiry. But in a phone interview last Thursday, Gilbert S. McInerny, the firm's third-ranking official, initially indicated uncertainty with the case and asked a reporter to recount it for him. Then he said, "My comment is 'no comment.'"

Over the weekend, however, the identity of the firm was confirmed from other sources.

The investigation came to light soon after investigators for Retail Credit began inquiring about Constantine among his neighbors in Bethesda and among former fellow aides in the Senate Special Committee on Aging.

Some of the persons interviewed swiftly reported the investigation to Constantine and Tom Vail, chief counsel of Senate Finance. Because the callers knew Constantine to be happy in his job they were puzzled by the investigators' suggestion that he was looking for another.

The Committee staff called in American Home. It stopped the investigation at once. William F. Laporte, chairman and president, submitted a written apology. He is reported to have deplored the investigation as "unsportsmanlike" and to have said it was undertaken without the knowledge either of himself or of McInerny's [illegible] in the company.

Sen. Russell B. Long (D-La.)

SEN. RUSSELL LONG
. . . accepts apology

reported the episode at a closed meeting of the Senate Finance Committee. The Senators present were "very surprised and very shocked," sources said.

Asked why the matter was not made public, Long said its would have been useless—specially because the company had "said it was sorry" and had apologized.

In addition to prescription drugs, American Home makes a wide variety of food, household products and proprietary drugs.

Bill Sets Penalty In Staff Checks

Rep. Richard L. Roudebush (R-N.Y.) has introduced a bill providing 10-year prison sentences and $250,000 fines for corporations that investigate members of Capitol Hill staffs.

The bill is an outgrowth of a recent episode in which the American Home Products Corp., which has prescription drug division, hired the Retail Credit Co. to investigate the "mode of living" of Jay Constantine, a Senate Finance Committee aide who had helped to draft legislation to reduce prescription drug prices.

H.R. 17550—SOCIAL SECURITY AMENDMENTS OF 1970—AMENDMENT

AMENDMENT NO. 889

Mr. LONG. Mr. President, the Committee on Finance is now holding hearings on H.R. 17550, the Social Security Amendments of 1970.

That bill contains many provisions designed to moderate and control the skyrocketing costs of medicare and medicaid—costs which will total some $15 billion in this fiscal year.

I am confident that the committee will be able to improve upon the fine work already done by the House of Representatives in the medicare and medicaid areas. I will submit today another cost-saving amendment which, if enacted into law, will result in estimated savings of upwards of $60 million a year in medicine and medicaid drug costs.

[redacted]

Based upon past experience, we may anticipate further aggressive attempts by the big drug companies to defeat this vitally important and needed amendment. Hopefully, this time the companies will confine themselves to the merits of my amendment. Previously, one of the largest drug companies, after [illegible] by [illegible] Additionally, [illegible] substantial financial [illegible] Finance Committee staff—which the Finance Committee staff man directed his attorney to donate to District of Columbia Children's Hospital.

Hopefully, for the sake of the responsible drug companies, they will not attempt such irresponsible behavior again.

RETAIL CREDIT COMPANY
INFORMATION FOR BUSINESS DECISIONS • HOME OFFICE: ATLANTA, GEORGIA

February, 1972

Dear Fellow Worker,

I don't know you but I see the results of your work. In fact, it is my job to determine how you do your job, so we are in this together. I often wish I could talk to you so we could understand and help each other.

Believe me -

It Makes the Difference

This Doesn't Tell the Story -

"Insured drinks to excess on weekends."
"Drinks to excess on special occasions."
"Drinks to feeling good and drives afterward."
"Drinks a few beers daily."
"Is criticized for being a heavy drinker."
"Used to drink a lot but quit."

We Haven't Done the Job Unless
We've Found Out and Reported -

What he drinks.
How often he drinks - daily, weekly, monthly, 1-3 a year?
How much he drinks -
  If daily - how many, and where, and when?
  If on weekends - every weekend, or most, or 1-2 a month?
  If to excess - feeling good or loud and boisterous or intoxicated?
    - how often - daily, weekly, monthly, 1-2 a month, 2-3 a year?
Where he drinks - home, tavern, lounge, club, parties, on the job?
When he drinks - evenings, lunch, on the way home from work?
How long - if he quit, specifically when and why?
Does he drive afterwards?

I hope you will keep this and find it of some benefit.

Most sincerely,

Ann Analyst
Quality Analysis Division
Research Department

BEST COPY AVAILABLE

30-A

RETAIL CREDIT COMPANY

INFORMATION FOR BUSINESS DECISIONS • HOME OFFICE ATLANTA GEORGIA

March, 1972

Dear Fellow Worker,

Your response to my first attempt to get together in our thinking on how to do our job better encourages me to send you my suggestions on another area of our work.

It Makes the Difference

This Doesn't Tell the Story -

"Lives common law."
"Lives with Mr. _____ (different name) but sources do not know the relationship."
"Subject living with woman without benefit of marriage."
"He is divorced because of his association with other women."
"He lives with another man and sources suspect them of living in an immoral relationship."

We Haven't Done the Job Unless We've Found Out and Reported -

Current marital status -
- If divorced - when, why, whose fault?
- If separated - how long, cause, divorce planned?

Past and present moral reputation -
- If promiscuous - extent, class of partners?
- If particular affinity - how long, criticized, partner beneficiary?
- If living with partner - how long, children, status here, criticized, is there living undivorced spouse?
- If illegitimate child - how old, circumstances, favorable reputation regained, living and working conditions?

Possible homosexuality -
- How determined - living together, demonstrates affection for partner in public, dress and/or manner, criticized, associates with opposite sex?

Most sincerely,

Ann Analyst

Quality Analysis Division
Research Department

Supreme Court, U. S.
FILED
DEC 16 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-709

UNITED STATES OF AMERICA ex rel David P. Weinberger and DAVID P. WEINBERGER, ESQ., individually,

Petitioners,

v.

EQUIFAX, INC. (formerly Retail Credit Company),

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

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EQUIFAX, INC. (formerly Retail Credit Company),

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF RESPONDENT IN OPPOSITION

Respondent opposes Petitioner's prayer that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on August 12, 1977.

OPINIONS BELOW

The opinion of the court of appeals is officially reported. *United States ex rel Weinberger* v. *Equifax, Inc.*, 557 F.2d 456 (5th Cir. 1977). The order of dismissal of the district court that is the subject of the opinion of the court of appeals is not officially reported. Both the opinion of the court of appeals and the order of dismissal of the district court are reprinted in the appendix of the Petition, beginning at pages 7-A and 1-A, respectively.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1977, and that court denied a petition for rehearing on October 4, 1977. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioner misstates the questions assertedly presented by the Petition. Correctly stated, they are as follows:

1. Does the Anti-Pinkerton Act, 5 U.S.C. § 3108 (1970), that was first enacted in 1892 and that bars employment by the federal government or the government of the District of Columbia of employees of the Pinkerton Detective Agency or similar organizations, apply to Respondent which is dissimilar in not offering for hire quasi-military armed forces?
2. Does Petitioner have standing to seek a declaratory judgment that would provide that the Anti-Pinkerton Act applies to the employment by the federal government of Respond-

ent's services where none of Respondent's past services is alleged to have been in respect of Petitioner nor to have injured Petitioner in any way?
3. If the Anti-Pinkerton Act applies to Respondent, does Respondent's otherwise proper billing of the federal government for services actually rendered constitute a violation of the False Claims Act, 31 U.S.C. §§ 231-232 (1970), where it is not alleged that the government was misled by Respondent, nor that the government made it clear it would not employ detective agencies generally, and where it would be inappropriate to charge Respondent with notice of its alleged coverage by the Anti-Pinkerton Act?

STATUTES INVOLVED

The Anti-Pinkerton Act, 5 U.S.C. § 3108 (1970), provides in full as follows:

> An individual employed by the Pinkerton Detective Agency, or similar organization, may not be employed by the Government of the United States or the government of the District of Columbia.

The False Claims Act, 31 U.S.C. §§ 231-232 (1970) is lengthy and is reproduced in full in the appendix A of the Petition, beginning at page 22-A.

STATEMENT OF THE CASE

The basis of federal jurisdiction in the court of first instance, the United States District Court for the Southern District of Florida, was 18 U.S.C. § 1331 and 31 U.S.C. § 232(A).

In the district court, Petitioner, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 and § 2202 , sought a declaratory judgment that Respondent is an organization within the scope of the Anti-Pinkerton Act, 5 U.S.C. § 3108 (1970), and, because of this status, that Respondent may no longer furnish information to the United States and that past and present contracts between the United States and its agencies and Respondent are illegal, null and void.

In addition, Petitioner, as an informer under the False Claims Act, 31 U.S.C. §§ 231-232 (1970), sought similar declaratory relief, an accounting of all sums paid by the United States or its agencies to Respondent pursuant to any contract between them, and statutory penalties.

The Petition does not contain a correct statement of the alleged facts material to the questions presented. Those alleged facts are as follows:

Petitioner is a citizen of the United States. Respondent is a corporation in the business of collecting information concerning prospective insurance customers and prospective employees and of reporting that information to the insurance company or employer who engages Respondent for that purpose.

In collecting that information, Respondent uses in some cases investigative techniques similar to those employed by detective agencies.

Respondent has in the past provided and presently does provide information concerning prospective government employees to the United States and its agencies pursuant to contract.

Petitioner at one time applied to the United States Civil Service Commission for employment and, in response to a Civil Service request for permission to conduct a background investigation on Petitioner, Petitioner gave his assent to that background investigation. However, Respondent has not been employed by any agency of the United States to investigate Petitioner nor has Petitioner been injured by any investigation by Respondent for the government.

Respondent does not provide watchmen for plants and buildings and it does not offer for hire a quasi-military armed force.

ARGUMENT

At the threshold, the Petition should be dismissed because it fails to present with accuracy, brevity and clearness that which is essential to a ready and adequate understanding of the points requiring consideration. Supreme Court Rule 23, paragraph 4.

Point I

The Inapplicability of the Anti-Pinkerton Act.

Because of the ambiguity apparent on the face of the Anti-Pinkerton Act with respect to its scope of application, the court of appeals examined the legislative history of the Act and determined that it did not apply to Respondent because Respondent does not offer for hire quasi-military armed forces as did the Pinkerton Detective Agency and similar organizations in 1892. 557 F.2d at 461-63. But the question of the meaning and scope of the Anti-Pinkerton Act is not a question, as Petitioner claims, of such importance that it should be decided by this Court as well.

For Respondent, and organizations similar to it, are already the subject of modern, federal regulation, and there is no reason to look to obscure and obsolete legislation as a further means of regulation. In 1970, Congress enacted the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t, with the avowed purpose of requiring "consumer reporting agencies" (of which Respondent is one) to

> adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner that is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information . . . [15 U.S.C. § 1681(b)]

The Federal Trade Commission has promulgated interpretive regulations under the Fair Credit Reporting Act: 16 C.F.R. §§ 1.71-1.73 and 16 C.F.R. § 600 (1977). Thus, there is no reason for this Court to pour new wine into an 85 year old act that the court of appeals below aptly described as "an expression of legislative frustration" at the then seemingly unreachable strike-breaking activities of the Pinkertons. 557 F.2d at 461-63.

The court of appeals attached little importance to decisions of the Comptroller General in making its determination, and Petitioner asks this Court to issue the writ to correct this assertedly erroneous attitude. But the weight to be given Comptroller General decisions in matters of statutory construction does not deserve this Court's attention in this case when the subject matter of the statute is not of great importance. Furthermore, at best the decisions of that officer are inconsistent with one another, although Petitioner denies this and the court of appeals apparently found them consistent when it disposed of the

matter in a footnote. 557 F.2d at 463, fn. 6. The Petition itself refers to an opinion of the Comptroller General's office in the form of a letter to US Senator Lawton Chiles dated January 10, 1975, that expressly states that the Anti-Pinkerton Act does not apply to Respondent, and the Comptroller General reaffirmed this position in a letter to Petitioner on December 12, 1975. (Both of these letters are reproduced in the Appendix to this Brief, beginning at pages 1a and 17a, respectively.) Thus, there is nothing in this case that compels this Court to consider the proper weight to be given to Comptroller General decisions.

Point II

Petitioner's Lack of Standing To Obtain Declaratory Relief.

With respect to standing, Petitioner erroneously states that the court of appeals held that a citizen must show a direct injury to himself in order to pursue a claim under the False Claims Act, 31 U.S.C. §§ 231-232 (1970). To the contrary, the court of appeals held as follows on this point:

> The district court ruled that Weinberger lacked standing to assert his informer's suit, that he had failed to comply with the procedural requirements of the [False Claims] Act, and that he had failed to state a claim under the Act. We hold that Weinberger had standing under the False Claims Act and properly pursued the action, but we agree with the district court that he failed to state a claim under the Act. [557 F.2d at 460]

The court of appeals did hold, however, that apart from the False Claims Act the plaintiff had no standing to challenge under the Anti-Pinkerton Act the alleged purchase of Respondent's services by the government, where Petitioner did not allege that any of

the services were in respect of or adversely affected him. 557 F.2d at 459-60. This holding is completely in line with the cases cited by the court of appeals, i.e., *Warth* v. *Seldin,* 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975); *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). There is no reason for this Court to address this issue once again, particularly where the court of appeals ruled that Petitioner had standing under the False Claims Act to bring the merits of his Anti-Pinkerton Act claim before that court for its consideration.

Point III

The Absense of a False Claim.

This case is not appropriate for the court to determine whether the False Claims Act applies to a government contractor who performs services and submits billings without blemish but for the fact the contractor may fit within a category of organizations with which the government is forbidden to do business. It is inappropriate because there is no aliegation that Respondent ever misled the government about who it was; nor is it alleged that the government made it clear that it would not employ detective agencies. It is inappropriate because a fair reading of the Anti-Pinkerton Act puts the onus on the government not to employ rather than upon the contractor not to accept employment. The court of appeals correctly held that in "this case the False Claims Act is not an enforcement device for the Anti-Pinkerton Act." 557 F.2d at 461.

This case is also inappropriate because, if this Court were to rule that Respondent is covered by the

Anti-Pinkerton Act, it would be unfair to hold Respondent on notice of that coverage sufficient to charge it with fraud under the False Claims Act. The 85-year-old Anti-Pinkerton Act is ambiguous on its face. No courts but the two below have ever construed it, and the two below construed it not to cover Respondent. The Comptroller General, whose decisions Petitioner deems so important, decided that the Act did not apply to Respondent the only times it addressed this specific issue. Despite this gross uncertainty and doubt that the Anti-Pinkerton Act applies to Respondent, Petitioner asks this court to charge Respondent with knowing that it is covered by the Act and to penalize Respondent to Petitioner's gain (as well as to the gain of the government that has never objected to Respondent's services) under the False Claims Act. This request should be dismissed.

Petitioner's attack on the composition and alleged bias of the court of appeals' panel in an effort to invoke this Court's power of supervision is an unworthy effort that characterized Petitioner's efforts in both courts below. The court of appeals addressed and rejected such attacks on the district court. 557 F.2d at 463. The attack here is worth mentioning only because it gives further evidence that this is not a petition that deserves this Court's further consideration.

CONCLUSION

For the reasons set forth above, Respondent asks that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-139965 Jan. 10, 1975

The Honorable Lawton Chiles
United States Senate

Dear Senator Chiles:

Your letters of June 7, November 5, and December 19, 1974, forwarded for our comment letters from Mr. David P. Weinberger of West Miami, Florida, questioning the propriety of Federal contracts with certain consumer credit reporting agencies in light of 5 U.S.C. § 3108, the so-called "Anti-Pinkerton Act," which provides that—

> "An individual employed by the Pinkerton Detective Agency, or similar organization, may not be employed by the Government of the United States or the Government of the District of Columbia."

By way of background, our correspondence with Mr. Weinberger in this area dates back to mid-1971. In July 1972, Mr. Weinberger questioned a proposal by the Department of Health, Education, and Welfare (HEW) to utilize Retail Credit Company of Atlanta, Georgia, to "spot welfare cheaters and find deserting fathers." Since the matter appeared to involve the proposed award of a Government contract, we began development of the case in accordance with our bid protest regulations, 4 C.F.R. §§ 20.1 *et seq.* HEW subsequently informed us that it did not intend to be a party to any such contracts, and that discussions had centered around possible arrangements between credit reporting agencies and State or local governments to provide information concerning the income of

welfare recipients. In this context, the matter was outside our bid protest authority and, on August 30, 1972, we so advised Mr. Weinberger.

Mr. Weinberger's subsequent letters to you, to various officials of the General Accounting Office GAO), and to several other Government agencies, have advanced the contention that the Anti-Pinkerton Act prohibits the Federal Government from employing certain credit reporting agencies, most specifically Retail Credit Company. He claims that Retail Credit is in reality a "detective agency" within the meaning of the Act, and details a number of controversies involving the company in recent years (several of which were reported by columnist Jack Anderson in the *Post,* December 8, 1971). He also contends that the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.* (FCRA), was not intended to modify the Anti-Pinkerton Act, that 15 U.S.C. § 1681f limits the kinds of information credit reporting agencies may furnish to governmental entities, and that "inventigative consumer reports" as defined in 15 U.S.C. § 1681a(e) violate the Anti-Pinkerton Act.

The original Anti-Pinkerton Act was enacted as part of the Sundry Civil Appropriation Act of August 5, 1892, 27 Stat. 368. It was made permanent the following year by the Act of March 3, 1893, 27 Stat. 591. The legislation resulted from congressional concern over the use of private detectives as armed guards by private industry in the labor disputes of the 1880's and 1890's. It appears that Pinkerton detectives were frequently used as strikebreakers and labor spies, a practice which became an emotionally charged issue and gave rise to acts of violence. The Act was given its present wording by the 1966 recodification of title 5, United States Code, Pub. L. No. 89-554, 80 Stat. 378, 416. Many bills have been introduced over the years to repeal or modify the Act but all have failed of enactment. Examples are: H.R. 11743, 86th Cong.; H.R. 7865, 87th Cong.; S. 1543, 88th Cong.; S. 3224, 89th Cong.; S. 2740,

92d Cong.; H.R. 15091, 92 Cong.; H.R. 1433, 93d Cong. A comprehensive discussion of the origins of the Act is contained in S. Rep. No. 447 (to accompany S. 1543), 88th Cong., 1st Sess. (1963).

To our knowledge, the Anti-Pinkerton Act has never been interpreted or discussed in a reported decision of any court. Over the years, however, we have had frequent occasion to consider the Act in rendering decisions on the propriety of expenditures for Government contracts. In this manner, a small body of law has evolved. Since, in your letter to Mr. Weinberger of June 7, 1974, you expressed the desire to be advised on the applicable law, we are providing the following summary of the principles developed through our decisions.

(1) The Act applies to contracts with "detective agencies" as firms or corporations as well as to contracts with or appointments of individual employees of such agencies. 8 Comp. Gen. 89 (1928).

(2) The Act prohibits the employment of a detective agency or its employees, regardless of the character of the services to be performed; the fact that such services are not to be of a "detective or investigative" nature is immaterial. Thus, detectives or detective agencies may not be employed in any capacity. 26 Comp. Gen. 303 (1946).

(3) The statutory prohibition applies only to direct employment; it does not extend to subcontracts entered into with independent contractors of the United States. 26 Comp. Gen. 303 (1946). It is clear from the legislative history of the original 1892 Act that Congress did not intend to reach subcontracts. S. Rep. No. 447, *supra,* at 3-6.

(4) Although we have never defined "detective agency" for purposes of the Anti-Pinkerton Act, we have drawn a distinction between detective agencies

and protective agencies, and have expressed the view that the Act does not forbid contracts with the latter. 26 Comp. Gen. 303 (1946); 38 Comp. Gen. 881 (1959). Thus, the Government may employ a protective agency, but may not employ a detective agency to do protective work.

(5) In determining whether a given firm is a detective agency, we must consider the nature of the functions it may perform as well as the functions it in fact performs. Two factors are relevant here—the firms' authority under its corporate charter and its powers under licensing arrangements in the states in which it does business. If a firm is chartered as a detective agency and licensed as a detective agency, then the fact that it does not actually engage in detective work will not permit it to escape the statutory prohibition. Since virtually every corporation inserts in its charter an "omnibus" clause ("engage in any lawful act or activity for which corporations may be organized in this state," or similar language), we have held that an omnibus clause alone will not make a company a detective agency. Rather, specific charter authorization is needed. 41 Comp. Gen. 819 (1962); B-146293, July 14, 1961.

(6) The Government may employ a wholly-owned subsidiary of a detective agency if the subsidiary itself was organized primarily or solely to avoid the Anti-Pinkerton Act. As long as there is *prima facie* separation of corporate affairs, we do not believe the Act compels us to "pierce the corporate veil." 41 Comp. Gen. 819 (1962); 44 Comp. Gen. 564 (1965).

Before discussing Retail Credit Company specifically, it is necessary to examine the status of credit reporting agencies generally. FCRA defines "consumer reporting agency" as—

> ". . . any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports."

15 U.S.C. § 1681a(f). "Person" is defined in 15 U.S.C. § 1681a(b) as "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." This is consistent with prior judicial definitions. For example, the Supreme Court of Mississippi, in *Retail Credit Company* v. *Garraway,* 240 Miss. 230, 126 So. 2d 271, 273 (1961), defined "mercantile agency" as follows:

> "Mercantile agencies are establishments which are in the business of collecting information relating to the credit, character, responsibility, general reputation and other matters affecting persons, firms and corporations engaged in business. They furnish this information to subscribers of the agency for a consideration. The purpose is to procure such information concerning the trustworthiness of persons and corporations engaged in business as will enable their subscribers safely and properly to conduct business with strangers or distant customers."

It is true, as Mr. Weinberger has pointed out, that reporting necessarily implies investigation. There can be no question that credit reporting agencies engage in investigative work—this is how they get their information. The FCRA definition cited above recognizes this ("*assembling* . . . information"). In the past, we have used the term "investigative" somewhat synonymously with "detective" for the purpose of distinguishing an investigative agency

from a protective agency. However, we have never maintained that a company which engages in, or is authorized to engage in, *any* investigative work whatsoever becomes by virtue of that fact a detective agency, and we do not believe that our decisions, read in their proper context, stand for this proposition. An adoption agency investigates its applicants yet it is certainly not a detective agency as the term is commonly understood. *Cf.* also *Shpack d/b/a Equity Research Company* v. *Baretti,* 349 N.Y.S. 2d 256 (1973), in which it was held that the business of discovering and recovering assets belonging to individuals which are either unknown to the owner or so old as to indicate that they have been abandoned or forgotten, did not amount to the business of a "private investigator" for purposes of the New York licensing statute.

We see the very enactment of FCRA as an indication of congressional recognition that credit reporting agencies do not fall within the Anti-Pinkerton prohibition—at least insofar as Government agencies are concerned—and in this sense we agree with Mr. Weinberger's assertion that FCRA was not intended to modify the Anti-Pinkerton Act. We must assume Congress was aware of the Act when considering and passing FCRA, yet there is no mention of it in FCRA or its legislative history. There are indications, however, that credit reporting agencies were viewed as something different from detective agencies. In a statement before the Subcommittee on Consumer Affairs, House Committee on Banking and Currency, during hearing on H. R. 16340 (an early House version of the FCRA), 91st Cong., 2d Sess. 184 (1970), Professor Arthur R. Miller, then of the University of Michigan School of Law, said—

> "We know that there is a high level of information exchange between the credit bureaus and *detective agencies*. . . . The data collected by a credit bureau . . . may be made available to governmental agencies, employers, insurance companies, *detective agencies* . . . ." (Emphasis added.)

Similarly, Professor Alan F. Westin, Columbia University Law School, in a statement before the Subcommittee on Financial Institutions, Senate Committee on Banking and Currency, Hearings on S. 823 (the Senate bill which was subsequently incorporated into H.R. 15073 as title VII, which in turn became title VI, Pub. L. No. 91-508, the FCRA), 91st Cong., 1st Sess. 83 (1969), noted that the credit reporting agency—

> ". . . is only one link in a private investigation and intelligence network that has expanded enormously in the United States in the past several decades."

Federal Trade Commission guidelines issued shortly after the enactment of FCRA provide as follows:

> "It should be noted that persons who compile reports on individuals for employment purposes are also covered by the Act. Accordingly, private detectives, detective agencies, and other personnel reporting entities are consumer reporting agencies when they prepare and furnish reports to be used in connection with hiring, promotion, retention (including an employee suspected of dishonesty), or reassignment of an individual." 117 Cong. Rec. 17418 (1971).

We note further that hearings on Commercial Credit Bureaus conducted in 1968 before the Special Subcommittee on Invasion of Privacy, House Committee on Government Operations, 90th Cong., 2d Sess., contain at pages 159 ff. an article on the extent to which Government agencies are authorized by law to make use of mercantile reporting agencies. There is no suggestion that such use is in contravention of law.

In line with the foregoing, it is our opinion that credit reporting agencies should not categorically be deemed detective agencies for purposes of the Anti-Pinkerton Act. Mr. Weinberger apparently concurs in this view, since he stated in a letter to our Deputy General Counsel, dated

February 16, 1974, that "I am not suggesting for a moment that the United States may not do business with legitimate credit reporting firms." He went on, however, to state in the same letter:

> "I am suggesting that despite the unfortunate measure of respectability given to 'investigative consumer reports' by the Fair Credit Reporting Act, these types of information compilations are illegal within the meaning of 5 U.S.C. Sec. 3108, and that all other activity of firms and persons preparing such 'investigative consumer reports' should be proscribed under that Act."

This reveals what appears to be an underlying inconsistency in Mr. Weinberger's position. If investigative reports are illegal under § 3108, and if all credit reporting agencies by hypothesis do some investigative work, then all credit reporting agencies would have to be detective agencies for purposes of § 3108—a result we believe was contemplated neither by the Anti-Pinkerton Act nor by FCRA.

There is now for consideration the question whether Retail Credit Company falls within the scope of the general considerations discussed above. In addressing this question, we specifically refrain from commenting on the various improprieties on the part of Retail Credit cited by Mr. Weinberger since they involve matters beyond our jurisdiction, i.e., matters of State law, criminal law, and matters placed by statute within the responsibility of other agencies. In any event, they are of tangential significance to the question at hand, our concern being with the nature of Retail Credit's work rather than how it is performed.

To determine the nature of the work Retail Credit is authorized to do, we obtained a copy of its corporate charter. The "purpose statement" is set forth below in full:

> "The particular business in which it desires to engage is the making of reports to insurance companies concerning the propriety or advisability of accepting applications for insurance; the making of financial reports on all matters of financial concern to its patrons; the making of investigations for the furnish ng of information in reference to investments and credits and the furnishing of such information; the doing of a general reporting business; the procuring and furnishing of information as to claims presented against or asserted by any person, firm, partnership or corporation; the issuance of such publications as may from time to time be deemed necessary or advisable in the conduct of its business; the lending of money upon such security as its corporate authority may approve; the acquiring by purchase, exchange or otherwise of any real estate or interest therein, and personal property and choses in action, including stocks, bonds, deventures [sic] and/or any other kind of security or securities issued by persons, partnerships or corporations, including securities issued by the Federal, State or Municipal governments, and also including all forms of securities issued by itself; and/or the notes of individuals or partnerships or corporations, secured or unsecured; also the right to lease any real estate or interest therein; to own and hold such properties or interest in properties, and to sell or otherwise dispose of the same; and in general to manage its properties or interest therein. Said corporation shall also have power to act as agent or broker for any person or persons in the transacting of any lawful business."

As noted above, we have never attempted to define "detective agency," nor have we spelled out exactly what a charter must contain in order to make a company a detective agency for purposes of § 3108. It certainly should not require the actual words "detective agency." In the ab-

sence of a suitable definition, some insight may be gained from what the term is understood to mean in contemporary usage. As one indication of this, we examined the listings and advertisements in the 1974 Washington, D.C., "yellow pages" telephone directory under the heading "Detective Agencies." (There is a separate heading for credit reporting agencies.) Functions vary somewhat but may be roughly grouped into two categories, protective services and investigative services. Protective services include such things as general armed guard service, industrial security (plant, store, etc.), and residential security (apartment, hotel, etc.). The following types of service may be called investigative: domestic (divorce, child custody), insurance, criminal, employment, accident, and location of missing persons. In addition, many agencies conduct polygraph examinations. In accordance with our prior decisions, even though protective services appear to be commonly furnished by detective agencies, we would not consider an agency furnishing solely protective services to be a detective agency for purposes of § 3108.

We understand that over 80% of Retail Credit's work is in the area of insurance investigating and reporting. Credit and employment reporting make up the remainder. Hearings on S. 823, *supra,* at 218. Under its "omnibus" clause ("act as agent or broken for any person or persons in the transacting of any lawful business"), Retail Credit could legally engage in all other types of investigative work, but this is not enough to invoke the Anti-Pinkerton prohibition. From the information available to us, Retail Credit's investigative functions are all commercial in nature. There appears to be no specific charter authority covering the other investigative areas commonly associated with private detectives (e.g., domestic, criminal, and accident investigation, and location of missing persons). Thus, to the extent that Retail Credit can be called an investigative agency, it is a specialized rather than a general one.

Our position regarding interpretation of the Anti-Pinkerton Act was set forth in detail in 44 Comp. Gen. 564 (1965.) Although that case involved the relationship of a subsidiary to its parent corporation, we believe the approach reflected therein is pertinent here and hence quote at length from that decision:

> "In the first session of the eighty-eighth Congress, Senator McClellan introduced S. 1543 which proposed to repeal the anti-Pinkerton statute. The outright repeal provision of the bill was later amended to preclude only the employment of detective personnel for the purpose of providing investigative services; and as amended, the bill passed the Senate without much discussion. 109 Cong. Rec. 19743. In the House, the bill was not reported out of committee. The report on the bill from the Senate Committee on Government Operations, S. Rept. No. 447, dated August 20, 1963, is most instructive with respect to the circumstances leading to enactment of the anti-Pinkerton legislation in the first instance and as to the reasons for proposing its repeal. We quote the conclusions drawn by the Committee, appearing at page 7 of the report:
>
> " 'As indicated earlier, S. 1543 would repeal a provision of law which was adopted originally 71 years ago, as a temporary limitation in an appropriation measure, and was made permanent the following year. Its enactment arose out of public and congressional concern resulting from the use by steel and railroad corporations of employees of the Pinkerton and other detective agencies as armed guards, labor spies, and strikebreakers in labor disputes, giving rise to bloodshed, loss of life, and destruction of property.
>
> " 'An examination of the legislative history of the provision reveals that, in its original form, it would have prohibited the Federal Government and the government of the District of Columbia from entering

into any contracts with firms or corporations which employed as armed guards employees of the Pinkerton or similar detective agencies. This provision was felt by the Congress to be too drastic, under the circumstances, since its effect might have been to require the Government to terminate various defense contracts then in effect. Furthermore, it was felt that such action, if appropriate, should be accomplished by positive legislation, following the reports and recommendations of Senate and House committees investigating these activities, rather than by means of a rider to an appropriation act.

"Following numerous Senate-House conferences on the provision in question, the present language was adopted as a compromise, on the last day of the 1st session of the 52d Congress. The same provision was included in an appropriation measure the following year, without any any floor discussion or debate.

" 'Labor-management relations today are fully regulated by Federal and State statutes, and all of the Federal agencies concerned agree that there is no longer any justification for the continuance of this prohibition. Furthermore, it appears that it discriminates against those detective agencies which furnish both investigative and protective services, and is detrimental to the best interests of the Government, since it eliminates from competitive bidding numerous major detective agencies which would otherwise respond to Government invitations to bid on contracts for the furnishing of supplementary guard service. Finally, the committee has in its files, copies of letters from officials of various unions having contracts with the Pinkerton and similar agencies, endorsing the enactment of an identical bill which was pending in the House of Representatives in 1960, as well as information showing that the Pinkerton Detective Agency, as

of 1960, had contracts with unions throughout the country.

" 'It is the view of the committee that the present prohibition serves no useful purpose whatever, is detrimental to the best interests of the Government, and discriminates against a class of detective agencies without any justification. Accordingly, the committee urges enactment of S. 1543.

"These conclusions and the underlying detailed review of the anti-Pinkerton measure history contained in the Committee's report leave no doubt but that whatever may have been the overriding policy considerations leading to enactment of this legislation some 70 years ago, they do not have much, if any, bearing on the current practice of the Government contracting for guard services of the type here involved.

"While we shall of course be required to apply the literal provisions of the anti-Pinkerton statute for so long as it remains in force, we do not consider that it embodies such elements of a policy nature as to require that we pierce the corporate veil in situations comparable to Wackenhut Corporation and its subsidiary Wackenhut Services, Incorporated. Application of the statute is itself somewhat ambiguous in light of the intention of the Congress which enacted it, even when considered in conjunction with the activities of the parent company. To further extend its application to the subsidiary company carries the injunction too far from its originally intended purpose for this Office to conclude that the parent and subsidiary are one and the same. We understand that a number of subsidiaries of detective agencies now hold and have held Government contracts for guard services. Overruling our prior decision would doubtless require protracted considerations of each case to ascertain the exact relationship of each contracting company to its parent

> and the question of whether or not its current contracts should be canceled at the cost of much disruption to the Government's business. We do not believe we would be justified in subjecting the Government to such disruption of its activity on the basis of so equivocal a policy as underlies the 70 year old anti-Pinkerton statute as it relates to the furnishing of guard services to the Government today."

We recognize that the question of Retail Credit's status is a close one. Based, however, on the information available to us, and keeping in mind that the prohibition of § 3108 is expressed in terms of "the Pinkerton Detective Agency, or similar organization," it is our opinion that to call Retail Credit Company a detective agency for purposes of § 3108 would require a degree of interpretation far beyond anything contemplated by the original statute.

Finally, Mr. Weinberger argues that 15 U.S.C. § 1681f limits the types of information credit reporting agencies may furnish to Government agencies. Section 1681f, entitled "Disclosures to governmental agencies," provides:

> "Notwithstanding the provisions of section 1681b of this title, a consumer reporting agency may furnish identifying information respecting any consumer, limited to his name, address, former addresses, places of employment, or former places of employment, to a governmental agency."

Section 1681b, entitled "Permissible purposes of consumer reports," provides:

> "A consumer reporting agency may furnish a consumer report under the following circumstances and no other:
>
> "(1) In response to the order of a court having jurisdiction to issue such an order.

> "(2) In accordance with the written instructions of the consumer to whom it relates.
>
> "(3) To a person which it has reason to believe—
>
> "(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or
>
> "(B) intends to use the information for employment purposes; or
>
> "(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or
>
> "(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or
>
> "(E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer."

"Person" includes governmental agencies or subdivisions for purposes of FCRA. 15 U.S.C. § 1681a(b).

It seems clear to us that § 1681f was not intended to limit disclosures permissible under § 1681b. Rather, § 1681f permits limited disclosure in addition to § 1681b to agencies that presumably would not qualify for full reports under § 1681b. The legislative history of FCRA supports this reading. Thus, the provision that became § 1681f was explained in S. Rep. No. 91-517 (to accompany S. 823), 91st Cong., 1st Sess. 6 (1969), as follows:

> "The disclosure of information to governmental agencies is limited to identifying type information

such as name, address and place of employment *unless the governmental agency* has obtained a court order or *is a bona fide creditor, insurer, employer, or licensor.*" (Emphasis added.)

We hope the foregoing serves the purposes of your request. The enclosures to your letters are returned herewith.

Sincerely yours,

R. F. KELLER
Deputy Comptroller General
of the United States

Enclosures

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-139965 Dec. 12, 1975

David P. Weinberger, Esq.
5920 S.W. 16th Terrace
West Miami, Florida 33155

Dear Mr. Weinberger:

We have received your letters over the past several months concerning the status of Retail Credit Company in light of the so-called "Anti-Pinkerton Act," 5 U.S.C. § 3108, which prohibits employment by the Federal Government of any "individual employed by the Pinkerton Detective Agency, or similar organization," and the Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681 *et seq.* We provided partial replies on August 1 and October 14, 1975, B-139965. The purpose of this letter is to complete that response.

On July 1, 1975, you requested copies of all unpublished decisions on the "meaning and application" of the Anti-Pinkerton Act. We are enclosing those decisions herewith, which are listed in Attachment 1. To provide as complete a package as possible, please note that we are sending (a) published decisions (some of which you may already have), (b) unpublished decisions (except those already sent to you on October 14), and (c) decisions of the Comptroller of the Treasury, covering the period prior to 1921. We regret that some of the earlier decisions are barely legible, but we are sending the best quality that we were able to reproduce. Other decisions you may see cited in some of the enclosed decisions merely cite the Act without discussion or application. In our October 14 letter, we explained why only a small portion of our decisions can be published. As indicated in previous correspondence, we are sending the same material to Paul M. Stokes of Smathers & Thompson, counsel for Retail Credit Company.

In your May 15 letter, you contend that our Federal claims collection regulations, specifically 4 C.F.R. §§ 104.2 and 105.3(b) are outdated in light of FCRA. Section 104.2 lists "credit agency skip locate reports" as a permissible means of assistance in locating missing debtors. Section 105.3(b) provides that credit data accompanying claims referred to the General Accounting Office or to the Department of Justice may take the form of a "commercial credit report." If a "skip locate report" is an "investigative consumer report" as defined in 15 U.S.C. § 1681a(e), its use must be disclosed to the consumer under 15 U.S.C. § 1681d. Literal compliance with section 1681d in the case of a missing debtor is, of course, impossible. If the skip locate report is merely a "consumer report" as defined in 15 U.S.C. § 1681a(d), its use must, as you point out, be in compliance with sections 1681b and 1681e. In any event, a Government agency may obtain the identifying information specified in section 1681f.

It has been clearly established in the courts that FCRA applies only to reports used in connection with personal as opposed to business or commercial transactions. *Wrigley* v. *Dun & Bradstreet, Inc.*, 375 F. Supp. 969 (N.D. Ga. 1974), *Sizemore* v. *Bambi Leasing Corp.*, 360 F. Supp. 252 (N.D. Ga. 1973); *Fernandez* v. *Retail Credit Co.*, 349 F. Supp. 652 (E.D. La. 1972). Our Federal claims collection regulations do not distinguish between personal and commercial claims. Thus, to the extent commercial claims are involved, the strictures of FCRA are not applicable. Also, it is our understanding that a "skip locate report" may be either a "consumer report" or an "investigative consumer report," depending upon how the information is gathered.

The Federal claims collection regulations are required to be issued jointly by the Attorney General and the Comptroller General. Hence, we cannot unilaterally make any changes. However, we are considering the points you raise and, if we conclude that a change is necessary or desirable, we will consult with the Attorney General to develop suitable language.

Your remaining letters deal with the status of Retail Credit Company, which you contend should be held a "detective agency" for purposes of the Anti-Pinkerton Act. In our previous consideration of this issue, we reviewed the history of the Act and its interpretation over several decades by our Office. We concluded that (1) credit reporting agencies should not categorically be deemed detective agencies for purposes of the Anti-Pinkerton prohibition, and (2) Retail Credit Company, although it certainly performs some investigative services, is not, in our opinion, a detective agency within the scope of that prohibition. We have reviewed the various materials you submitted with your letters and note especially that you have appealed the dismissal of your action against Retail Credit Company. While it has long been the policy of this Office to refrain from considering or commenting on matters which are currently in litigation, our review occurred before we were aware of your appeal. In any event, while we still believe that the question is a close one, we fail to find sufficient basis to alter our previous conclusion. This is not intended in any way as an endorsement of Retail Credit Company or of any of the methods it might employ.

We recognize and appreciate the sincerity of your contentions. Nevertheless, the matter has been fully reviewed in the past and we must now consider it closed.

Sincerely yours,

Comptroller General
of the United States

Enclosures (28)

cc: The Honorable Lawton Chiles
United States Senate

Paul M. Stokes, Esq.
Smathers & Thompson
Alfred I duPont Building
Miami, Florida 33131

ATTACHMENT

A. *Published decisions*

3 Comp. Gen. 681 (1924)

8 Comp. Gen. 89 (1928)

26 Comp. Gen. 303 (1946)

38 Comp. Gen. 881 (1959)

41 Comp. Gen. 829 (1962)

44 Comp. Gen. 564 (1965)

51 Comp. Gen. 494 (1972)

B. *Unpublished decisions* (NOTE: Decisions marked with an asterisk (*) were sent on October 14, 1975, and are not included herewith.)

AD-6772, June 6, 1922

*A-12194, February 23, 1926

A-18856, July 1, 1927

A-32584, August 19, 1930

A-92580, March 4, 1938

*B-32894, March 29, 1943

B-40145, February 19, 1944

B-65315, May 9, 1947

B-140066, November 19, 1959

B-146293, July 14, 1961

*B-156424, July 22, 1965

B-157050, August 9, 1965

B-157147, December 22, 1965

B-1605538/B160540, March 24, 1967

B. Unpublished decisions, cont'd.

B-160538, November 15, 1967

B-161770, November 21, 1967

*B-167723, September 12, 1969

B-139965, July 10, 1970

B-172587, June 21, 1971

*B-177137, February 12, 1973

B-176307(1), March 21, 1973

B-181684, March 17, 1975

C. Decisions of the Comptroller of the Treasury (prior to the creation of the General Accounting Office by the Budget and Accounting Act of 1921)

71 MS Comp. Dec. 488, October 31, 1914

80 MS Comp. Dec. 657, February 13, 1917

89 MS Comp. Dec. 1094, May 19, 1919

90 MS Comp. Dec. 1625, September 25, 1919

Supreme Court, U. S.
FILED
DEC 29 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-709

UNITED STATES OF AMERICA *ex rel* DAVID P. WEINBERGER, and DAVID P. WEINBERGER, ESQ., individually,

Petitioners,

versus

EQUIFAX, INC. (formerly Retail Credit Company),

Respondent.

On Petition for a Writ of Certiorari to the United States Fifth Circuit Court of Appeals

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION, U.S. S.Ct. Rule 24.4.

(Printed December 28, 1977)

David P. Weinberger,
Petitioner and Member,
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U.S. S.Ct. Rule 24.4.
(Printed December 28, 1977)

REPLY TO POINT I,
Respondent's Brief in Opposition at pp. 5-7.

Since 1960, there have been ten attempts in Congress to modify or repeal the "anti-Pinkerton" statute, 5 U.S.C. § 3108:

Repeal H.R. 11743, 86th Cong., 2d Sess.;
H.R. 7865, 87th Cong., 1st Sess.;
S. 1543, 88th Cong., 1st Sess.;
H.R. 15091, 92d Cong., 2d Sess.;
H.R. 1433, 93d Cong., 1st Sess.;
H.R. 13368, 94th Cong., 2d Sess.

Modification to permit detective agencies to furnish *non-investigative* services:

S. 3224, 89th Cong., 2d Sess.;
S. 2337, 91st Cong., 1st Sess.;
H.R. 11955, 91st Cong., 1st Sess.;
S. 2740, 92d Cong., 1st Sess.

These were being made before, during and after enactment of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq*. Thus respondent's statement at page 6 of his brief in opposition that 5 U.S.C. § 3108 is "obscure and obsolete legislation," particularly in view of recodification of 5 U.S.C. § 3108 into positive law in 1966 [Pub.L. 89-554, 80 Stat. 378, 416], is argument unworthy of this Court's time and attention.

Respondent utterly overlooks the consistency of Comptroller General decisions interpreting the "anti-Pinkerton" statute, except for the one rendered on Jan. 10, 1975 [#B-139965, Respondent's Brief at pp. 1A-16A] which led to this litigation. It was pointed out in the petition for certiorari at pp. 7-8 that the Comptroller General, when writing this decision, did not reveal to Senator Chiles or petitioner Weinberger that his General Accounting Office was a client of respondent. The Comptroller General has issued three more decisions interpreting 5 U.S.C. § 3108 since Jan. 10,

1975. They are lengthy discussions of past opinions, and are entirely consistent with all decisions on the "anti-Pinkerton" statute prior to that date. There is a very good reason why respondent wants to dismiss Comptroller General decisions lightly: *at no time in over 50 years of interpreting the "anti-Pinkerton" statute has the Comptroller General required that a vendor offer "quasi-military" or armed guard services before that act is administratively applied. Application depended upon whether or not the contractor in question was empowered, by other than an omnibus clause in a corporate charter, to furnish INVESTIGATIVE SERVICES without regard to whether it actually rendered them.*

Respondent characterizes the subject matter of the "anti-Pinkerton" statute as "not of great importance." [Brief in Opposition, p. 6.] Very recent national history teaches otherwise, in regard to Government involvement with private investigators.

REPLY TO POINT II,
Brief in Opposition, pp. 7-8.

Respondent well knows that the Court of Appeals ruled petitioner must show direct injury to himself *for the declaratory relief sought* [i.e., invalidity of respondent's Government contracts]. See footnote 3 of the Court of Appeals' opinion, and discussion related thereto, 557 F.2d at 460. Petitioner contends that the cases cited by the Court of Appeals, cited at pp. 15-18 of the petition, actually support his argument for standing as to the declaratory relief sought. Where an informer under the False Claims Act has jurisdiction under 31 U.S.C. § 232(C) on the basis of information

furnished to the Government which it did not previously possess, and has standing to maintain the action by meeting the case law requirement of prosecution of such claim by an attorney, he should have standing to seek a declaration of invalidity of any Government contract in question even if a false claim is not made out for technical reasons. This argument is by no means a reflection of any doubt on petitioner's part that a false claim is present in this case, *infra*.

REPLY TO POINT III,
Respondent's Brief in Opposition at pp. 8-9.

Construction of the False Claims Act by the Court of Appeals was not even necessary, in view of its interpretation of the "anti-Pinkerton" statute. Nevertheless, such construction was contrary to its own precedents and those of this Court, as is shown on pages 15 and 18-25 of the Petition for Certiorari. Respondent is a major corporation with an active, able and growing legal department. Only 12 days after Armed Services Procurement Regulation § 22.108 was promulgated, calling attention to the statutory prohibition on Government hire of detective agencies *for any character of service*, one of respondent's *marketing* rather than *legal* officials represented that its services were proper for the Government and that, even if the prohibition of 5 U.S.C. § 3108 were applicable to the parent (Retail Credit) Company, it would not apply to its subsidiaries. See Appendix herewith, pages 1-A and 2-A. This legal conclusion is faulty, because it ignores two Comptroller General decisions requiring *prima facie separation* between business entities for purposes of interpreting the

Pinkerton prohibition, 41 CompGen 819 (1962), 44 CompGen 819 (1965), and the fact that respondent's subsidiaries are not separate by virtue of financial and other operating consolidation with the parent corporation.

At page 9 of its Brief in Opposition, respondent points to "the gross uncertainty and doubt that the anti-Pinkerton Act applies to Respondent" after conceding at page 4 that "Respondent uses in some cases investigative techniques similar to those employed by detective agencies." In *United States v. Cooperative Grain & Supply Co.*, 476 F.2d 47, 55, it was said that

> ". . . Eligibility for payments must be established by the recipient . . . The Government discharges its legal duty to inform by publishing the regulations in the Federal Register . . . *The applicant for public funds has a duty to read the regulations or be otherwise informed of the basic requirements of eligibility* . . ." (e.s.)

Here a substantive federal *statute* is involved, not mere regulations. If respondent was uncertain of the applicability of 5 U.S.C. § 3108, it had a duty to disclose to the Government that it did, in fact, use "in some cases investigative techniques similar to those employed by detective agencies," Brief in Opposition at page 4. The factual questions of precisely what respondent told the Government in obtaining its contracts, and what it knew when it accepted payments on those agreements, govern the applicability of the False Claims Act to respondent. These questions

should have been resolved below if construction of the False Claims Act was appropriate, but never were.

The last paragraph of the Brief in Opposition, at page 9, makes it appear that petitioner Weinberger objected merely to the fact that the trial judge's son was an associate of counsel of record. The Court of Appeals opinion has, unfortunately, completely omitted the real substance of petitioner's complaints to that forum about what went on in the trial court. Petitioner claimed in the Court of Appeals that respondent had misrepresented the tenor of a Comptroller General decision [in its memorandum supporting a motion to dismiss the complaint as amended, R. 95-96; A. 30-31]. Respondent's counsel wrote that

> "Among the latest reported opinions on the Act is B-15361, 44 Comp. Gen. Op. 564, March 18, 1975 [sic-DPW], in which the issue presented was whether the Anti-Pinkerton Act prohibits the Atomic Energy Commission from contracting for protective services with a corporation that is exclusively engaged in providing such services but is a wholly owned subsidiary of a detective agency, namely Wackenhut Corporation. *The Comptroller General ruled that where there existed "at least proforma elements of separate identity, "THE OVERRIDING POLICY CONSIDERATIONS OF THE ACT — PROHIBITION OF THE USE OF DETECTIVES IN LABOR DISPUTES — does not require piercing the corporate veil and prohibiting the proposed contract with the Atomic Energy Commission.'* " (e.s.)

The Comptroller General actually wrote at 44 CompGen 564, 568 that:

> ". . . *whatever may have been the overriding policy considerations* leading to enactment of this legislation some 70 years ago, they do not have much, if any, bearing on the current practice of the Government contracting for guard services of the type here involved." (e.s.)

Respondent ignored the fact that 44 CompGen 819 was not "among the latest reported opinions on the Act" because it was TEN years old, having been published in 1965 and been repeatedly followed thereafter in later decisions. Respondent misled the trial court into holding the "anti-Pinkerton" act applicable only in times of labor disputes. See also R. 67, R. 98. It is worth noting that the Court of Appeals reversed that limited construction, 557 F.2d at 462.

CONCLUSION

If respondent is the *bona fide* consumer reporting agency it claims to be, why is there now fresh evidence of its extensive violation of the Fair Credit Reporting Act? See decision of Administrative Law Judge Theodor P. vonBrand, a 300-page opinion released by the Federal Trade Commission on December 14, 1977, FTC Docket No. 8954, covering a four-year proceeding in which a record of over 16,000 pages of testimony is reportedly involved.

Appellant's principal brief on appeal to the Fifth Circuit Court of Appeals discusses at pp. 52-60 why

the "anti-Pinkerton" and Fair Credit Reporting Acts are not *in pari materia*. They do not regulate exactly the same subject matter. Congress did not understand when enacting the latter that it was opening the door to Government business with detectives so as to repeal the "anti-Pinkerton" act as it had been interpreted by the Comptroller General and codified into positive law. See respondent's denials to Congressional committees as to detective agency status, complaint at pp. 7, R. 7, A. 7. Nor are detective agency and consumer reporting agency status mutually exclusive. The Federal Trade Commission, in its enforcement of the Fair Credit Reporting Act, has applied that law to the "reporting" of detective agencies for insurance and employment purposes.

Respectfully submitted by:

David P. Weinberger,
Petitioner and Member,
The Florida Bar
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(Certificate of Service is made by separate affidavit)

11-26-8-RR

MARKETING INFORMATION SERVICE
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JOHN F. HARRIS, ASSISTANT VICE PRESIDENT

November 16, 1971

Mr. Richard J. Richardson
Department of the Army
Defense Supply Service - Washington
Washington, D. C. 20310

Dear Mr. Richardson: Re: SADSS/DLB/OX5-4275
Cont. No. DAHC15 71 C 0295

This letter responds to the questions raised by Captain Knox Cologne in his conversation with our Mr. John Massey on November 16, 1971.

Captain Cologne raised three questions. The answers to these questions are listed below:

1. Retail Credit Company holds the following licenses:

   California - Private Investigator
   New York - Private Investigator
   Florida - Private Investigator
   Delaware - Private Detective
   Connecticut - Private Detective
   Nevada - Private Investigator
   Las Vegas - Private Detective

   These licenses were secured in compliance with state and municipal law and were not subjected to arbitration due to the minimal business expense involved.

2. Retailers Commercial Agency and Credit Bureau, Incorporated of Georgia, are wholly owned subsidiaries of Retail Credit Company. Credit Marketing Services, Incorporated is a wholly owned subsidiary of Credit Bureau, Incorporated of Georgia.

   The Home Office of each firm named above is 1600 Peachtree Street, N. W., Atlanta, Georgia 30309.

Enclosure 1

A DIVISION OF RETAIL CREDIT COMPANY

BEST COPY AVAILABLE

3. Our position is that we are not an agency "similar" to Pinkerton and therefore are not covered by 5 USC 3108. Even if a court were to hold Retail Credit Company subject to this section, by no stretch of the imagination would the subsidiaries be brought under it.

Please let us know should you or Captain Cologne require any additional information.

Yours truly,

John F. Harris
Assistant Vice President

JFH:BLL